Central Law Journal.

ST. LOUIS, MO., JANUARY 14, 1898.

Some time ago we called attention to the conflict between the State and federal courts of Indiana, regarding the constitutionality of legislation of that State concerning street railroad rates, known as the "three cent fare" enactment. Central Trust Co. v. Citizens' Street Railway Co., 45 Cent. L. J. 225. The decision of United States Judge Showalter, in that case, has recently been upheld by the United States Court of Appeals. The Indiana legislature passed an act reducing the fares on street railroads in cities having more than 100,000 inhabitants at the last preceding United States census. This legislation was attacked on the ground that the charter of the railroads was embodied in an act of 1861 as amended and in force up to March last, and that that charter could not be amended in the manner proposed by the act, which, as affecting railroads, was special legislation, forbidden under a section of the constitution prohibiting the passage of laws under such circumstances. Judge Showalter held the act invalid as involving special legislation of the kind forbidden, saying that all the courts in the State judicially knew that Indianapolis was the only city in the State having more than 100,000 inhabitants at the date of the last United States census—the specification in the act—and that no matter how many cities might by subsequent increase of population exceed in number the 100,000 mark the act could not apply to them, because at the time of the passage of the law Indianapolis alone had the number mentioned.

Later the Supreme Court of Indiana in an action to enforce a penalty provided by ordinance for the refusal by a passenger to pay a five cent fare, wherein the city asserted the invalidity of the act as impairing the obligation of a contract, and also as special legislation, held that no contract the obligation of which was impaired by the act had been pointed out; that the city was not authorized to enter into any contract which would prevent the legislature from legislating regarding fares, and that in order to exempt a common carrier from legislative control over its rates of fare it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power by the legislature. Upon the other question, the court laid down the rule that a law which applies to cities having a population of 100,000 or more, but which is so framed as to operate on all other cities in the State as they acquire the necessary population, is a general law because it operates upon all cities alike under the same circumstances, and that it is not necessary that a law concerning fares to be collected by street railroad companies shall operate uniformly on all cities in the State, but only on all such companies under the same circumstances and conditions. The court of appeals now affirm the decision of Judge Showalter awarding an injunction, asked for by the mortgagee, upon the ground that the ordinance in question would injure its securities. Judge Wood, who delivered the opinion for the court, said that the contention of the appellee and the decision of the court below, in part at least, was that by force of the statute providing for the organization of street railroad companies and by force of the requirement of the constitution of Indiana, all such corporations should be created or formed under general laws, and that the State entered into a contract with the appellee, whereby it was stipulated and agreed, that while that statute might be either amended or repealed, such amendment or repeal could only be compassed by a general law applicable alike to all similar corporations throughout the State. The proposition, Judge Woods said, assumed that the company had a vested right or privilege within the meaning of the contract clause of the national constitution. It had no right under that contract which the State might not modify, abridge or annul by amending or repealing the act of 1861. But it was insisted that the amendment or repeal could only by affected by a general law applicable alike to all similar corporations throughout the State. The contention as to the violation of the contract was based on the ground that the act of 1897 was in conflict with the State constitution, and the court below reaffirmed the unconstitutionality of the enactment. From that conclusion it followed, Judge Woods said, without going further, that the motion to dissolve the in-

junction should have been overruled as it was, and it was unnecessary in that court, and on a review of the question in an appellate court it would be unnecessary to consider whether the question of the impairment of contract was or is involved. This decision leaves the restraining order of Judge Showalter in force, but it does not dispose of the main question involved in the case as to the impairment of contract, which will ultimately be brought before the Supreme Court of the United States.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS — INJURY — CONTRIBUTORY NEGLIGENCE.—The duty owing by a railroad company to a passenger actually or constructively in its care is of such a character that the rules of law regulating the conduct of a traveler upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing toward it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. This distinction is well illustrated by the decision of the Supreme Court of the United States, in Warner v. Baltimore & O. R. R. Co., 18 S. C. Rep. 68. In that case it appeared that one who had procured a railroad ticket necessarily had to cross, from the depot, an intervening track, in order to reach his train after it had stopped at the platform, and in so doing was struck and killed by a train coming at full speed in the opposite direction. It was held that the case was not governed by the strict rules as to stopping, looking and listening applicable to trespassers or to strangers crossing tracks, and the question whether plaintiff was guilty of contributory negligence should have been submitted to the jury. The court calls attention to the decision of the New York Court of Appeals in Terry v. Jewett, 72 N. Y. 344, the doctrine in which was approved in Brassell v. Railroad Co., 84 N. Y. 246, and is supported by the following authorities: Railroad Co. v. Shean, 18 Colo. 368, 33 Pac. Rep. 108; Railroad Co. v. Anderson, 72 Md. 529, 530, 20 Atl. Rep. 2; Baltimore & O. R. Co. v. State, 60 Md. 463, 465; Railroad Co. v. White, 88 Pa. St. 333, 334; Klein v. Jewett, 27 N. J. Eq. 550; Wheelock v. Railroad Co., 105 Mass. 208. The supreme court adds that "to concede the rule, and, in a given case, to take a passenger beyond its protectien by holding that one who goes in proper time to a station for the purpose of taking a train over the road, and has a ticket for travel thereon, is not to be considered as a passenger until he has manifested by some outward act his intention to board a train and become a passenger, is to admit the rule on the one hand and on the other to deny it. It is also clear that to say that one who goes to a station to take a train must exercise the same circumspection and care as a traveler on the highway or a trespasser, unless by some implication the corporation has invited the person to deport himself as a passenger, and that such implication must be determined as matter of law by the court, and not of fact by the jury, is, in effect, under the form of a qualification, to destroy the rule. The situation of the tracks, the location of the station building and the waiting room, the coming of the local train, and its stopping to receive passengers in a position which required the latter to cross a track in order to reach the train, involved necessarily a condition of things which, under one view of the testimony, constituted an implied invitation to the passenger to follow the only course which he could have followed in order to take the train; that is, to cross the track to the waiting train. While it is true, as was said in Terry v. Jewett, *supra*, that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless, it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution. The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care."

MORTGAGE — FORECLOSURE—STAY LAW—RETROACTIVE OPERATION.—The Supreme Court of Washington decides, in Swinburn v. Mills, 50 Pac. Rep. 489, that Laws 1897, ch. 50, pp. 70-76, entitled "An act relating to the sale of property under execution and decree and the confirmation of sheriffs' sales," etc., and providing (section 10) that "in case of foreclosure of mortgages or other liens nothing shall prevent the sale of the entire premises included within the mortgage or lien," includes mortgages as well as executions; that section 18, providing that "this act shall not apply to judgments entered prior to the taking effect thereof, nor to executions which shall issue thereupon, but proceedings thereunder shall be had in all respects in the manner now provided

by law," etc., affirms the legislative intent to make the act retroactive as to all antecedent contracts which have not proceeded to judgment or decree before its passage, and that in so far as it provides that, on a decree for foreclosure of a mortgage executed before the act was passed, defendant shall be entitled to have the order of sale stayed for one year, and that the land must then be appraised, and bring at least 80 per cent. of the appraised value, the act is void as an impairment of contracts.

BILLS AND NOTES — TRANSFER AS SECURITY FOR PRE-EXISTING DEBT. — The Supreme Court of Tennessee, in Atlanta Guano Co. v. Hunt, 42 S. W. Rep. 482, hold that the transfer of negotiable paper or of notes payable in property (which are assignable, but non-negotiable, under the laws of Tennessee), as security for a pre-existing debt, and upon an express agreement for a definite extension of time for payment of said debt, is a transfer for value. It appeared there that notes payable in property were delivered to plaintiff by the payee, without indorsement, as collateral security for the latter's own notes held by plaintiff. Upon redelivery of the property notes to the payee for collection, he transferred them before maturity, for value, to a third person, who had no notice of plaintiff's ownership. It was held that plaintiff, having put its agent in possession of notes which showed on their face that the latter was owner, was estopped from questioning the title of the transferee.

APPEARANCE BY ATTORNEY—PRESUMPTION OF AUTHORITY.—The rule formerly obtained in England, and in some of the States of the Union, that an appearance by an attorney for a party without his sanction or authority was deemed sufficient for the court, which would look no further, but would proceed, and leave the party to his remedy against the attorney, unless he was irresponsible, or his appearance was through procurement or collusion with the adverse party. Latuch v. Pasherante, 1 Salk. 86; Denton v. Noyes, 6 Johns. 296; Bunton v. Lyford, 37 N. H. 512. However, the rule in nearly, if not all, of those jurisdictions has latterly been much qualified, and disabused of its ancient rigor. But by the current of the more modern authorities it has been discarded as void of sound reason for its support. Judge Dillon, in Harshey v. Blackmarr, 20 Iowa, 161, very ably demonstrates the injustice of the rule. He says: "It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by a judgment of a court without a day in court. It relieves the other party of a duty which, in reason, belongs to him, viz., to serve his process, and to see, at his peril, that his adversary is in court. And it carries out this unsoundness by compelling the wrong party to look to the attorney. True, reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act it never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority, and carelessly omitting to serve process, or to require the attorney to show his authority, has been damaged, he, and not myself, should be the one to look to the attorney." The inexorable logic of this great jurist has had its effect, so that there is now no longer any doubt but that the enforcement of a judgment obtained and resting upon the unauthorized appearance of an attorney for a party not served may be restrained in equity, irrespective of the question whether the attorney is responsible or irresponsible, or acted by procurement or collusion with his antagonist. Parsons v. Nutting, 45 Iowa, 404; Newcomb v. Dewey, 27 Iowa, 381. The Supreme Court of Oregon has recently passed upon this question in Handley v. Jackson, following the modern rule and holding that in a proceeding to restrain the enforcement of a judgment on the ground that the only appearance of defendant was by an unauthorized attorney, it is competent to hear evidence *aliunde*, offered for the especial purpose of rebutting the presumption of authority in the attorney.

CORPORATIONS — SUBSCRIPTION TO STOCK—PAYMENT—FRAUD OF SUBSCRIBERS.—The conclusion of the Supreme Court of Ohio, in Gates v. Tippecanoe Stone Co., 48 N. E. Rep. 285, on the subject of payment of subscriptions to corporate stock in property at an inflated value is instructive. It was held that where pursuant to an agreement among themselves, partners capitalize the partnership property at a valuation greatly in excess of its true value; create a corporation, under the laws of this State, to continue the former partnership business, fixing its capital stock at a sum equal to the inflated value placed on the partnership property; elect themselves managing officers of the concern; transfer this property, at such inflated value, to the corporation in exchange for its entire capital stock, which they cause to be issued, as fully paid up, to each partner, or as he directed, in proportion to his interest in the partnership; and the corporation, continuing the business, afterwards becomes insolvent,—the transaction will be regarded as a fraud upon the corporate creditors, although none was intended or contemplated by the parties to such transaction. In such case each partner will be regarded as an original subscriber for so much of the stock as was thus issued to him, and credited on his subscriptionf or the actual value only of his interest in the partnership property transferred to the corporation in payment of such subscription. The balance left, after applying this credit, will be deemed a debt due from him to the corporation, and therefore corporate assets.

EMINENT DOMAIN AND TAXATION AS RELATED TO THE USE OR PURPOSE FOR WHICH PROPERTY IS TAKEN OR TAXES LEVIED.

1. *Definitions.*—"Eminent domain is that sovereign power vested in the people, by which they can, for any public purpose, take possession of the property of any individual upon just compensation paid to him."[1] On the other hand, taxation is defined to be a "rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or State."[2] And we are told that eminent domain, or the power to take private property for public use, like taxation, belongs to every independent government. Being an incident of sovereignty it requires no constitutional recognition.[3]

2. *Scope of the Discussion.*—My intention in this discussion of these prerogatives of government, is to confine myself to those instances where the right of eminent domain and the power of taxation have been invoked, not for the direct benefit of the public in general, but only for the benefit of a few individuals of the State or community. I treat together what may be properly considered as two subjects, because the principles underlying the authorities cited are applicable to both methods of taking private property for public use. Generally speaking, the right of eminent domain gives some of the persons who compose the public the power to take, in their individual capacity, the property of others, and use it for certain specified purposes, the only limitation being that those purposes must be public; compensation being made, of course, to the owner. While the right of taxation is exercised by the sovereign power by taking money from individuals for the use of the State in its organized capacity as a government. In the former case the property is taken for a specific public use, for a full consideration paid; but in case such use is abandoned the property reverts to the original owner or his heirs. The chief profit from the use flows to a few individuals, while the public receives an incidental benefit. In the latter case, money once taken by taxation and used by the State is forever lost to the citizen who pays it; and he is obliged to look for his compensation to the public benefits shed upon all from its expenditure. And again a few individuals reap the chief profit while the public benefit is incidental. These are the distinctions, in a general sense, between eminent domain and taxation.

3. *The Use.*—In either case the use must be public and not merely private. Upon this question of what constitutes a public or private use: 1. Of the property taken by eminent domain. 2. Of money collected by taxation, the courts have often been called upon to pass. Of these we will consider:

1. *Eminent Domain.*—It will be best to leave out all reference to the many instances where the question of the use being public has long been settled and is no longer questioned, and give attention to cases of a more doubtful character. In Iowa the power of one to appropriate the land of his neighbor through which to construct a tile drain has been denied.[4] It has been declared within the power of the legislature to grant the right of eminent domain in the establishment of a mill under certain circumstances.[5] Also to appropriate water for irrigation purposes and lands for irrigation canals.[6] Also to condemn lands necessarily used in the mining industry.[7] But other courts have held to the contrary.[8] And statutes authorizing condemnation of lands for private roads are generally held unconstitutional.[9] But in Idaho a different rule has been adopted; owing, very likely, to peculiar conditions, that may exist in a sparsely settled, mountainous country. There condemnation of a private or by-road was held within the constitutional provision permitting lands to be taken "for rights of way for the construction of canals * * * or any other use necessary for the complete development

[1] 6 Am. & Eng. Enc. of Law, 511.

[2] Burrill Law Dictionary.

[3] United States v. Jones, 109 U. S. 513, L. Ed. Bk. 27, 1015.

[4] Fleming v. Hull, 35 N. W. Rep. 673. See also Bankhead v. Brown, 25 Iowa, 540.

[5] Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

[6] Oury v. Goodwin (Ariz.), 26 Pac. Rep. 376; Golden C. Co. v. Bright, 8 Colo. 144; Coffin v. Left-hand Ditch Co., 6 *Id.* 443.

[7] Hand Gold Mining Co. v. Parker, 39 Ga. 419; New Cent. Coal Co. v. George's Creek Coal Co., 37 Md. 537; Gets' Cases, 105 Pa. St. 547; Overman Silver M. Co. v. Corcoran, 15 Nev. 147.

[8] Consolidated Channel Co. v. Cent. Pac. R. R. Co., 51 Cal. 269; People v. Pittsburgh R. R. Co., 53 Cal. 694; Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379.

[9] Logan v. Stogdale (Ind.), 24 N. E. Rep. 135; 6 Am. & Eng. Ency. of Law, 529 and cases; Welton v. Dickson (Neb.), 57 N. W. Rep. 559. A railroad company

of the material resources of the State."[10] Individuals may occupy rivers with dams and booms for logging purposes.[11] A Massachusetts statute attempted to authorize the taking by eminent domain of certain property for the purpose of establishing a public library; but the court held the act unconstitutional, as the purpose was really private.[12] An act of congress, of March 3, 1893, appropriating land at Gettysburg, Pa., for the purpose of preserving lines of battle and to mark tactical positions of the armies on the field, held unconstitutional as not for a public use.[13] An act of the legislature providing for the construction of drains for agricultural, sanitary or mining purposes, across lands of others, held unconstitutional as not a proper exercise of the right of eminent domain.[14] Under the constitution of Colorado, permitting the taking of land for reservoirs, flumes, drains, ditches and milling purposes, it has been held that a right of way may be condemned over private lands for a ditch to carry water to operate an electric light plant.[15] Where a railroad company sought to condemn land for a road over which it could reach a private manufactory, a steel mill, and transport freight to and from such mill, it was held that the purpose was private.[16] A Michigan statute authorizing a cemetery company to condemn lands for the purpose of enlarging its cemeteries was held unconstitutional because the purpose was private.[17]

Where Purpose is Part Public and Part Private.—Where power is granted by statute to condemn lands for a navigable canal there is no power to take water to sell for private use.[18] So the statutes authorizing the exercise of the power are strictly construed.[19] And if an attempt is made to join a private with a public purpose the entire grant or power will be void; as where a water-works company attempted to condemn a right of way for the purpose of supplying the city with water and also to sell power to private parties.[20] So where a railway company alleged that property was needed for its right of way and also for the "alteration of river street," it was held that condemnation for railroad purposes was valid, but for street purposes invalid, and the blending of the two purposes gave the court no jurisdiction to condemn, and therefore the proceedings were void.[21] In a leading case in Nebraska[22] it was held: 1. That the use of water for irrigation purposes was a public use, in the constitutional sense. 2. That to the legislature and not to the courts had been committed the power to determine the exigencies requiring the exercise of the power of eminent domain. But on this last point see Pittsburg, W. & K. R. R. Co. v. Benwood Iron Works,[23] where it is held that the question is a judicial one. Where a company undertook to furnish water to three different villages, it was held that lands might be taken for a canal, although the company will aslo use the canal to furnish water to private persons from whom it secured the water right.[24] Also the surplus of water above what is required for public use may be used for private purposes, where the latter is only incidental to the main purpose of supplying the public.[25] And the same rule was applied where a dam was built for the purpose of furnishing water to a public canal but there was a large surplus which was disposed of to private parties.[26]

2. *Taxation.*—When taxes are levied for other than governmental purposes and certain individuals receive the direct and chief

may not open a highway from its road to a hotel one-third mile distant, solely to accommodate its patrons. *In re* Rochester & G. H. R. Co., 12 N. Y. S. 566.

[10] Latah County v. Peterson, 29 Pac. Rep. 1089.

[11] Lancaster v. Kennebeck Co., 62 Me. 272; Cotton v. Miss. Boom Co., 22 Minn. 372; Borcherdt v. Wausau Boom Co., 54 Wis. 107.

[12] Cary Library v. Bliss, 25 N. E. Rep. 92, 151 Mass. 364.

[13] United States v. Certain Tract of Land, etc., 67 Fed. Rep. 869.

[14] *In re* Theresa Drainage Dist. (Wis.), 63 N. W. Rep. 288.

[15] Lamborn v. Bell (Colo.), 32 Pac. Rep. 989.

[16] Pittsburgh, W. & K. R. R. Co. v. Benwood Iron Works, 8 S. E. Rep. 453, 31 W. Va. 710.

[17] Board of Health of Tp. of Portage v. Van Hoesen, 49 N. W. Rep. 894.

[18] Cooper v. Williams, 5 Ohio, 391; Buckingham v. Smith, 10 Ohio, 288; Varick v. Smith, 5 Paige, 137.

[19] Lewis, Eminent Domain, sec. 238.

[20] *In re* Barre Water Company (Vt.), 20 Atl. Rep. 109, 3 Am. R. R. & Corp. Rep. 136.

[21] Chicago & N. W. R. R. Co. v. Galt (Ill.), 23 N. W. Rep. 425, 1 Am. R. R. & Corp Rep. 365.

[22] Paxton & Hershey Irr. Canal & L. Co. v. Farm. & Merch. Irr. & L. Co., 64 N. W. Rep. 343.

[23] 8 S. E. Rep. 453 (W. Va.).

[24] Pocantico Water-Works Co. v. Bird (N. Y. App.), 29 N. E. Rep. 246, 130 N. Y. 249.

[25] State v. City of Newark (N. J. Supp.), 23 Atl. Rep. 129.

[26] Kaukauna W. P. Co. v. Green Bay & M. Canal Co., 142 U. S. 254.

benefit of the levy, nevertheless the purpose must be public and for the benefit of the public; and the benefits must accrue directly to the municipality wherein the taxes are levied and paid.[27] "If there be no benefit but a flagrant and palpable departure from equity in the burden imposed * * * it must be regarded as an aggression and unconstitutional."[28] Two things must concur, the purpose must be public, and there must be a public benefit accruing to the tax payer; nor is a legislative declaration or decision that a given purpose is public always conclusive.[29] In the last case cited a tax was authorized by legislative enactment to aid the Jefferson Liberal Institute at Jefferson; but the court found it to be a private school, and in the opinion the following principles were laid down: "Nor will the location of the institution at Jefferson and the incidental benefits which may arise to the people of the town sustain the tax. This is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise, in their midst, of any useful trade or employment and the argument, pursued to its logical result, would prove that compulsory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends or the purpose of mere individual gain and emolument." In Whiting v. The Sheboygan & Fond Du Lac R. R. Co,[30] the court held that a donation to a railroad company could not be sustained and that a tax levied to pay it was void on the ground that the use was private and not public; but the court held that a subscription to its stock would be valid. And these rulings were approved by that court in 1878.[31] But in Nebraska bonds in aid of a railroad are authorized by the constitution;[32] and many courts have held, in the case of railroads, that the use is always public;[33] while other authorities have followed the rule announced by the Wisconsin court.[34] A tax to raise a bounty to pay soldiers was held invalid as not being for a public use.[35] Also in a case where aid bonds were voted to the La Grange Iron & Steel Co., to assist in the erection of a rolling mill.[36] Aid bonds voted to a manufactory of iron bridges were held void;[37] and bonds voted to aid manufacturing.[38] But the taxing power may be exercised to provide for the payment of bonds issued for the purpose of supplying the people of a city with natural gas.[39] In some cases it has been held that where an industry was subject to public supervision the purpose was sufficiently public to support a tax in aid of it, as in case of a toll mill, the rate of toll being fixed by public authority.[40] But in the case of a steam grist mill, not regulated by the public, the aid bonds were held invalid.[41] So a beet sugar factory, not manufacturing for toll, nor subject to public regulation, cannot be aided by taxation.[42] But as in the case of eminent domain, it has been held that where the purpose is double, that is, part

[27] 1 Desty on Tax., 274, 281.

[28] *Id.* 286-7.

[29] Cooley on Const. Lim., 494; Curtis v. Whipple, 24 Wis. 350.

[30] 25 Wis. 167.

[31] Bound v. Wisconsin Cent. R. R. Co. ,45 Wis. 559. See also Rogan v. City of Watertown, 30 Wis. 264; Phillips v. Albany, 28 Wis. 340, where Judge Dixon expressed regret that the court ever sustained a subscription to the capital stock of a railway company.

[32] State *ex rel.* City of Lincoln v. Babcock, 27 N. W. Rep. 94.

[33] Beekman v. S. & S. Ry. Co., 3 Paige, 45; Bloodgood v. M. & H. Ry. Co., 18 Wend. 1; Bridgeport v. Railway Co., 15 Conn. 475; Sharpless v. Mayor, 21 Pa. St. 148; Thomas v. Allegheny Co., 7 Law Reg. 92; Talbot v. Dent, 9 B. Mon. 526; Cheeney v. Hooser, *Id.* 330; Railroad Co. v. Clinton Co., 1 Ohio St. 77; Steubenville Ry. Co. v. Township, *Id.* 105; Cass v. Dillon, 2 *Id.* 607; Ryder v. Railroad, 13 Ill. 516; Strickland v. Railroad, 21 Mass. 209; Olcott v. Fond du Lac Co., 16 Wall. 678, L. Ed. Bk. 21, 382.

[34] See 2 Burr. Law Dict. 509; Blackw. on Tax Tit. 7; Cooley, Const. Lim. 479; Booth v. Woodbury, 5 Am. Law Reg. (N. S.) 202; Phila. Assn. v. Wood, 39 Pa. St. 344.

[35] State *ex rel.* McCurdy v. Tappan, 29 Wis. 435.

[36] Cole v. City of La Grange, 113 U. S. 1, L. Ed. Bk. 28, 896, citing Loan Assn. v. Topeka, 20 Wall. 655, L. Ed. Bk. 22, 455.

[37] Parkersburg v. Brown, 107 U. S. 487, L. Ed. Bk. 27, 238.

[38] Allen v. Jay, 60 Me. 124; Lowell v. Boston, 111 Mass. 454; Weismer v. Douglass, 64 N. Y. 91; *In re* Eureka Co., 96 N. Y. 42; Bissell v. Kankakee, 64 Ill. 249; English v. People, 96 Ill. 566; Railway Co. v. Smith, 23 Kan. 745.

[39] State v. Toledo (Ohio), 26 N. E. Rep. 1061.

[40] Burlington v. Beasly, 94 U. S. 310, L. Ed. Bk. 24, 161; Osborne v. Adams Co., 106 U. S. 181, L. Ed. Bk. 27, 129; Traver v. Merrick Co., 14 Neb. 327, 15 N. W. Rep. 690; State *ex rel.* Perry v. Clay Co., 20 Neb. 452, 30 N. W. Rep. 528.

[41] State *ex rel.* Adams Co., 15 Neb. 568, 20 N. W. Rep. 96; Osborn v. Adams Co., 7 Fed. Rep. 441, 109 U. S. 1.

[42] Getchell v. Benton, 30 Neb. 870, 46 N. W. Rep. 468.

public and part private, the tax was invalid. As in the case where a city erected a dam and created a water power on the pretense of furnishing itself with power for its water and light systems, but also for the purpose of obtaining water power to lease to private parties for manufacturing purposes, it was held that the taxation was unlawful.[43] Also where bonds were issued for the purpose of erecting a public library building to include a G. A. R. hall, the first but lawful purpose being joined with the latter unlawful, rendered the bonds void.[44] In view of the principles declared in the cases herein cited it will be well for would-be investors in municipal bonds to particularly examine into the purpose for which such bonds are issued. And voters and residents of our cities, who are anxious to build up a false prosperity by voting aid to all sorts of enterprises, need to take warning and not attempt to override fundamental principles intended for the protection of the minority.

Kearney, Neb. WILLIS L. HAND.

[43] Natle v. City of Austin (Tex. Civ. App.), 21 S. W. Rep. 375.

[44] Klngman v. City of Brockton, 153 Mass., 26 N. E. Rep. 998, 4 Am. R. R. & Corp. Rep. 128, where other cases are cited on page 131.

MARRIED WOMEN — ANTENUPTIAL DEBTS.

KIES v. YOUNG.

Supreme Court of Arkansas, October 30, 1897.

The married woman's act, which, in effect, excludes the marital rights of the husband in the wife's property during coverture, and confers upon married women power to acquire and hold property, does not abrogate the common-law liability of the husband for the antenuptial debts of his wife.

RIDDICK, J. (after stating the facts): The question presented in this case is whether a husband is liable for the antenuptial debts of his wife. It is conceded that the husband was, at common law, liable for such debts (Harrison v. Trader, 27 Ark. 288), but the contention is made that the effect of our statute, which excludes the marital rights of the husband in the wife's property during coverture, and confers upon married women power to acquire and hold property, is to abrogate this rule of the common law. It is plain that this statute does not expressly change or affect the liability of the husband, but appellants argue that the reason upon which the rule was based have, by virtue of such statute, ceased to exist, and that, therefore, the rule itself should cease. It will be admitted that, if a rule of law be based upon certain specific reasons, which can be enumerated, and upon no others, and these reasons are all taken away, then the rule must fall; but, if some of the reasons for the law remain, the law itself remains, and the courts must enforce it, until changed by the legislature. 2 Bish. Mar. Wom. § 65. Now, it is difficult to state precisely all the reasons upon which was based the rule of law making the husband responsible for the antenuptial debts of his wife. It is probably true, as stated by the Supreme Court of New York, that an inquiry into the reasons of such rule "involves the consideration of all the rights, obligations, duties, liabilities, and disabilities given by the common law to the marital relation. And, so far as observed, no writer has yet authentically furnished all the reasons which may have influenced the various conditions of coverture imposed by the common law." Fitzgerald v. Quann, 33 Hun, 652. At common law the husband and wife were regarded as one person; the wife's legal existence was merged in that of her husband. "Upon this principle of a union of person in husband and wife," says Blackstone, "depend almost all the legal rights, duties, and disabilities that either of them acquire by marriage." 1 Bl. Comm. 442, Among the duties imposed by the law upon the husband was the duty to pay the debts of the wife contracted *dum sola*, for, says the same learned author, "he has adopted her and her circumstances together." *Id.* 443. But, if the liability of the husband rested in any degree upon the legal unity of the husband and wife, that reason still exists to some extent; for, notwithstanding the important changes wrought by our statute concerning the powers and rights of married women, many of the rules of law resting upon this unity of the husband and wife are still enforced by the courts of this State. This court, since the passage of the statute above referred to, has held that, by reason of such unity, the husband and wife cannot contract with each other (Pillow v. Wade, 31 Ark. 678), nor become partners in business (Commission Co. v. Salinger, 56 Ark. 294, 19 S. W. Rep. 747), nor sue each other in a court of law. Countz v. Markling, 30 Ark. 17. By reason of this legal unity, land in this State conveyed to the husband and wife jointly vests in them an estate by entirety, so that the survivor takes the whole, whereas, but for this theory of legal unity they would take as tenants in common. Robinson v. Eagle, 29 Ark. 202; Kline v. Ragland, 47 Ark. 116, 14 S. W. Rep. 474; Branch v. Polk, 61 Ark. 388, 33 S. W. Rep. 424. It will be seen by reference to these and other decisions of this court that the common-law unity of husband and wife still exists in this State, except so far as the legislative purpose to modify and change it has been expressed by statute.

But it is contended that the husband's liability rested upon the common-law principle, now abrogated by statute, that the personal property of the wife, the use of her real estate, the right to her labor and earnings, passed to the husband upon marriage. She was, it is said, by marriage de-

prived of the use and disposal of her property, and could acquire none by her industry; and that it was, therefore, necessary at common law to impose upon the husband the duty of paying her debts, otherwise her creditors would be remediless. It is true that at common law the creditor had, after marriage, no means of collecting his debt by action against the wife alone, so the common law solved the difficulty by requiring the husband to pay such debts. But the marriage of a *feme sole* may still place many obstructions in the way of her creditor who attempts to collect his debt by process of law. If there be issue of the marriage born alive, then at the wife's death the husband's title by curtesy attaches to her land as at common law, and this may result in postponing the rights of her creditors until after the termination of such life estate, as was held in the recent case of Hampton v. Cook (Ark.), 42 S. W. Rep. 505. The husband is still entitled to the benefit of her labor and services, except when "performed on her sole or separate account." Sand. & H. Dig. § 4995. "The true construction of the statute," says the court of appeals of New York, "is that she may elect to labor on her own account, and thereby entitle herself to her earnings; but, in the absence of such an election, or of circumstances showing that she intended to avail herself of the privilege and protection conferred by the statute, the husband's common-law right to her earnings remains unaffected." Birkbeck v. Ackroyd, 74 N. Y. 356. Now while, under our statute, a married woman may acquire property by engaging in business, or by performing labor and services upon her sole and separate account, yet, as the creditor has no means of compelling her to engage in such business, or to perform service upon "her sole and separate account," and as it is the rare exception that a married woman does engage in business or perform services for her separate account, we can easily see that marriage may still leave the creditor without a remedy unless the husband be held liable. The woman may have been the earner of valuable wages, and may have been credited on that account; yet if, after marriage, she chooses to labor for her husband only, the creditor can do nothing as against her, for, however valuable her earnings may be, they belong, under such circumstances, not to her, but to her husband. Birkbeck v. Ackroyd, 74 N. Y. 356; *Id.*, 11 Hun. 365; McCluskey v. Institution, 103 Mass. 300, 304. Again, it seems that the statute has made no provision for an action against the wife alone upon her antenuptial contracts. At common law the wife could not be sued alone. This was one reason for making the husband liable for the wife's antenuptial debts; and, if the statute has made no change in the law in this respect, it must follow that the husband is still liable for such debts. 2 Bish. Mar. Wom. §§ 312, 322. The language of our statue is that "a married woman may bargain, sell, assign and transfer her separate personal property and carry on any trade or business and perform any labor or services on her sole and separate account, * * * and she may alone sue or be sued in the courts of this State on account of said property, business or services." Sand. & H. Dig. § 4946. There are other sections of the statute providing that the contracts of a married woman in reference to her sole and separate estate or business shall not be binding upon her husband, and that judgments recovered against her may be enforced by executions against her sole and separate property, etc.; but these and other sections of the statute relating to actions against married women seem to refer to the actions mentioned in the section above quoted,—that is, to those on account of other separate property, business, or services, or upon her contracts in connection therewith. The reform undertaken by the legislature was to empower a married woman to hold property and make contracts, and in effecting this purpose it provided that she could be sued upon such contracts, and that her husband should not be liable therefor. But the question of her antenuptial debts does not seem to have been considered by the legislative mind, and there is in the statute nothing indicating an intention to change the law in reference thereto, or to relieve the husband of his liability therefor. Our statute under consideration was copied, or seems to have been copied, from the New York statute; and the courts of that State hold that the statute does not permit the wife to be sued alone in all cases, but simply enacts that she may be sued alone in actions having reference to her separate estate. Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. Rep. 354; *Id.*, 33 Hun, 652. The legislature of New York, by act of 1853, relieved the husband of liability for the antenuptial debts of his wife, but previous to the passage of that act he was held to be liable for such debts notwithstanding statutes then similar to our statute. Berley v. Rampacher, 5 Duer, 183. The liability of the husband at common law for the torts of the wife not committed in his presence rests upon substantially the same reason as his liability for her antenuptial debts. Fitzgerald v. Quann, 33 Hun. 657; 2 Bish. Mar. Wom. §§ 254, 312. But the New York courts, under the same statute that we have, hold that the husband is still liable for such torts, and base their decision upon the ground that the wife cannot be sued alone for such torts, and, further, that a statute should never be construed as abolishing a rule of common law, unless the intention to repeal is made known by express words or necessary implication. Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. Rep. 354. The courts of many other States have arrived at the same conclusion that these acts emancipating married women from the disabilities imposed by common law do not, of themselves, relieve the husband of his common-law liabilities, unless so expressed in the act. While some courts hold to the contrary, the weight of judicial opinion seems to be decidedly in favor of the view adopted by the New York courts, on the ground that the repeal of settled principles of law by mere implica-

tion should not be favored. Alexander v. Morgan, 31 Ohio St. 546; Platner v. Patchin, 19 Wis. 333; McElfresh v. Kirkendall, 36 Iowa, 224; Ferguson v. Brooks, 67 Me. 251; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. Rep. 912; Gill v. State, 39 W. Va. 479, 20 S. E. Rep. 691; Seroka v. Kattenberg, 17 Q. B. Div. 177; Mangam v. Peck, 111 N. Y. 401, 18 N. E. Rep. 617; 9 Am. & Eng. Enc. Law, 822.

The question as to whether the statute conferring enlarged powers upon married women has impliedly repealed the rule of law making the husband liable for the wife's antenuptial debts has never been decided by this court. "That question was not involved in the case of Gill v. Kayser, 60 Ark. 266, 29 S. W. Rep. 981, for the debt there was contracted during marriage, and had reference to the wife's separate property. It came within the provision of the statute which exempted the husband, and did not stand on the same footing as her debts contracted *dum sola*. But in Stowell v. Grider, 48 Ark. 223, 2 S. W. Rep. 786, the question was incidentally referred to by Judge Smith, who said that the husband was still liable for such debts. The same learned judge, in Kosminskey v. Goldberg, 44 Ark. 401, discussing the question of the liability of the husband for the torts of the wife, said that the husband was liable for such torts, although he was absent, and had no knowledge of the intended act; and he placed the husband's liability upon the ground that the wife could not be sued alone. But there is no more reason for saying that a wife could be sued alone for her antenuptial debts than that she could be sued alone for her torts committed in the absence of her husband. If these two opinions by Judge Smith stood alone, we should attach no great importance to them for the question as to the effect of the legislation giving enlarged powers to married women upon the common-law liability of the husband does not seem to have been raised in these cases. But these expressions of the learned judge are in harmony with many other expressions of opinion by this court, some of them quite recent, to the effect that the courts of this State will not move in advance of the clearly expressed legislative purpose to remove the disabilities, rights, and liabilities of coverture. The rule of law making the husband liable for the debts of the wife contracted *dum sola* was well known, and had often been enforced by the courts of this State. As the legislature which enacted the married woman's act did not, either by express words or by clear implication, express an intention to repeal such law, the presumption should be that they intended the rule should remain. Force is added to this argument when we consider that the act in question was copied from the New York law, but that our statute omits the provision found in the New York statute, relieving the husband of the liability for his wife's antenuptial debts. Our conclusion is that the husband may still be joined with the wife in actions against her for debts contracted by her *dum sola*, and that he is still liable for such debts as at common law. We admit that, as the husband has been deprived of the legal ownership and control of the wife's property during coverture, it would seem logically to follow that he should be relieved of some portion of his common-law liability for her antenuptial debts; but that is a question for the legislature, and not the courts. While theoretically the position of the husband is much worse now than at common law, still as a matter of actual fact, this is not altogether true. The statute permits the wife to hold and use her property as her own, but the close relationship that exists between husband and wife, and the love of a wife for her husband, patent now as of old, generally results in placing at his disposal all her wordly goods. The statute enabling married women to acquire and hold property does not, and no statute can, to any great extent, protect the wife's property against the aggressions of the husband, for it is generally her will that he should use such property as he pleases. But the statute does protect her property against the creditors of her husband. At the common law, if the husband became insolvent, the wife's personal property and the use of her real estate during his life could be seized by his creditors. If she acquired property by her earnings, that also could be seized, for it belonged to her husband. All this has been changed by the statute conferring upon married women power to acquire and hold property; and in this way these statutes frequently operate to the advantage of the husband. Many an insolvent husband has regained his financial footing by the use of his wife's property, protected against his creditors by the operation of such statutes. It is, indeed, possible under our statute that a woman in debt, but with considerable money, should marry, and then hide away her money, and allow her creditors to force her husband to pay her debts. Yet, considering the nature of woman, we think the case would be rare when this would be done against the husband's will. But if the husband was exempt from liability, a woman in debt, but with money, might, upon marriage, bestow her money upon her husband, and he might squander or conceal it, and refuse to pay her creditors, and leave them with a very doubtful remedy. The worst effect of statutes enabling married women to acquire and hold property is that, when the husband and wife are dishonest, they place the creditor at a great disadvantage. Mr. Bishop, who has given much thought to this question, says that under the statutes "husband and wife, if in due accord, and mutually inclined to defraud the rest of mankind, have it well in their power to live in wealth procured by lawful cheating from confiding creditors." If the debts are hers, the property can be shifted to him. If he be the one in debt, he can so arrange his affairs "that all the earnings shall be hers, and all the expenses his, whereby, in a short time, his estate is indirectly but effectually, transferred to her, while appar-

ently it remains his." Bish. Cont. § 951. Conderations of this kind furnish additional answer to the argument that the courts should hold as a matter of law that all reason for the rule making the husband liable for the wife's antenuptial debts has passed away. Notwithstanding the statutes depriving the husband of his marital rights in the wife's property during coverture, it is still rare that a man marries a rich woman without receiving pecuniary benefit from her estate, and he should at least be held liable to the extent of such benefit; but these matters cannot be adjusted by the courts, and should be left to the legislature, where they belong. The hardship in this case is, not that the law allows the wife to retain her separate property, but in the fact that she had no property. The position of the husband here is not worse than it would have been had the statute in question never been passed. As such statute does not expressly or by clear implication relieve him of liability for the antenuptial debts of his wife, we must hold that the judgment of the circuit court against him is in accordance with the law, and it is therefore affirmed.

NOTE.—Chief Justice Bunn, in an opinion dissenting from the majority of the court in the principal case, contends that the reason for the common-law rule holding a husband liable for the antenuptial debts of the husband has been taken away, and that the reason for the rule having ceased the rule ceases also. He says that the principle upon which the husband, at common law, is liable for the debts of the wife contracted *dum sola*, is not that he received property from her, nor is the liability based upon the idea that he is a debtor, but that the real ground of this liability is that the wife, by her marriage, is entirely deprived of the use of her real estate during coverture, and her person, labor and labors belong unqualifiedly to him. The wife, under the statute of Arkansas, he says, is no longer deprived entirely, or in any degree, of the use and disposal of her property, and she is at liberty to acquire property by her industry as if she were a *feme sole*. Her personal property does not now pass to her husband on her marriage to him, absolutely, or in any sense of ownership, nor is he entitled to the use of her real estate during coverture; and, finally, she retains all that she brings to him, or may acquire after their marriage, and this is all made subject to the payment of her debts, and he is relieved. For this reason he contends that the old common-law rule has been impliedly repealed. A sufficient answer to all this may be found in the opinion of the majority of the court, whose conclusion is clearly in harmony with the weight of authority on the subject. At common law a husband comes into full liability as to his wife's antenuptial contracts and debts, whether he gets any property with her or not (Anderson v. Smith, 33 Md. 467; Moore v. Leseur, 18 Ala. 606; Harrison v. Trader, 27 Ark. 288; Howarth v. Warneser, 58 Ill. 48; Hetrick v. Hetrick, 13 Ind. 44; Hamlin v. Bridge, 24 Me. 145; Hawes v. Bigelow, 13 Mass. 384; Barnes v. Underwood, 47 N. Y. 351; Dickson v. Miller, 19 Miss. 594; Wilson v. Wilson, 30 Ohio St. 365; Cale v. Shurtleff, 41 Vt. 311; Platner v. Patchin, 19 Wis. 333; Heard v. Stamford, 3 P. Wms. (Eng.) 400), and even though he be a minor. Roach v. Quick, 9 Wend. (N. Y.) 238; Cale v. Seely, 25 Vt. 220. On such contracts husband and wife must be sued jointly. The husband's liability ceases with the coverture (Gray v. Thacker, 4 Ala. 136; Angel v. Felton, 8 Johns. (N. Y.) 140; Carl v. Wonder, 5 Watts (Pa.) 97; Platner v. Patchin, 19 Wis. 333), unless it has been fixed by judgment. Fulty v. Fox, 9 B. Mon. (Ky.) 499; Bryan v. Doolittle, 38 Ga. 255; Burton v. Burton, 5 Harr. (Del.) 441. If the wife dies after judgment he continues liable. Bryan v. Doolittle, 38 Ga. 255. If not fixed by judgment, the husband's liability is destroyed by an absolute divorce, by his death or by hers. Bryan v. Doolittle, 38 Ga. 255; Wilson v. Wilson, 30 Ohio St. 365; Williams v. Kent, 15 Wend. (N. Y.) 360. But marriage does not suspend or destroy her liability, so that if he dies she continues liable Fulty v. Fox, 9 B. Mon. (Ky.) 500; Gage v. Reed, 15 Johns. (N. Y.) 403; Parker v. Steed, 1 Lea (Tenn.), 206), and if she dies her administrator is liable to the extent of assets, even though he be her widower, and she is liable after an absolute divorce. Humphrey v. Boyce, 1 Moody & R. 140; Jones v. Walkup, 5 Sneed (Tenn.), 135. This liability is not affected by any antenuptial or postnuptial agreement between the husband and wife. Harrison v. Trader, 27 Ark. 288. Nor, as a rule, do married women's statutes destroy the husband's liability, unless they so state (Conner v. Berry, 46 Ill. 370; Alexander v. Morgan, 31 Ohio St. 541; Platner v. Patchin, 19 Wis. 333), except in Illinois. Howarth v. Warneser, 58 Ill. 48. But in many of the States, including Alabama, California (Wood v. Orford, 52 Cal. 412), Maryland, North Carolina, Pennsylvania and Colorado, there are statutes expressly destroying their liability, or limiting it to the amount of the property obtained by the husband from his wife.

JETSAM AND FLOTSAM.

PAYMENT OF PART OF DEBT IN SATISFACTION OF THE WHOLE.

In your note upon Accord and Satisfaction, on page 193 of the current volume of the *Review*, you suggest that, while a payment of a part of what is due cannot be a satisfaction of the entire debt, such partial payment may, nevertheless, be effectual as a consideration to support a promise by the creditor not to collect the residue; and that in accordance with this distinction the case of Foakes v. Beer, 9 App. Cas. 605, might have been decided the other way, without any impeachment of Coke's familiar *dictum* in Pinnel's Case. This distinction, so far as I have observed, has not been taken by any writer upon Contracts. But the legal acumen of the writer of your "Note" will be appreciated, when I add that this distinction was explicitly stated nearly three centuries ago, and by no less distinguished an authority than Lord Coke himself.

His words, as reported in Bagge v. Slade, 3 Bulst. 162, are as follows: "And if a man be bound to another by a bill in £1,000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him the said bill of £1,000, this £500 is no satisfaction of the £1,000, but yet this is good and sufficient to make a good promise and upon a good consideration, because he had paid money, *sc.* £500 and e hath no remedy for this again." The same c e i found in 1 Roll. R. 354, where Coke is reported, a saying: "Although this is not any satisfaction of the debt, still it is sufficient to ground an action on the ase upon."

The meaning of this *dictum* is unmistakable. The creditor, notwithstanding the receipt of the £500, might still sue upon the bill and recover the other £500. But, if he should do so, he would have to refund the £500 as damages for breaking his contract to give up the bill. This cross action was the only mode by which, in Coke's time, the debtor could make use of the creditor's promise. To-day, of course, to prevent circuity of action, the debtor might plead the promise, if valid, as an equitable plea. The validity of such a promise was denied in Foakes v. Beer; and it is one of the ironies of fate that the house of lords unwittingly overruled the real opinion of Coke in Bagge v. Slade almost solely because they were not prepared to overrule his supposed opinion in Pinnel's Case.

Bagge v. Slade is also interesting on account of the point actually decided. The plaintiff and defendant were liable as co-sureties to A. In consideration that the plaintiff would pay A the entire debt, the defendant promised the plaintiff to reimburse him as to a moiety. The plaintiff paid the whole amount, but the defendant declined to keep his promise. To understand this case it must be remembered that the doctrine of contribution between co-sureties was not yet established, the court of common pleas saying, when granting a prohibition against a bill for contribution in the court of Requests, in 1613, "if one surety should have contribution against the other, it would be a great cause of suit." It was necessary, therefore, to prove a valid express contract for reimbursement. The court in Bagge v. Slade sustained the contract, thus setting an early precedent for the modern cases. Shadwell v. Shadwell, 30 L. J. C. P. 145; Scotson v. Pegg, 6 H. & N. 295, and Chichester v. Cobb, 14 L. T. Rep. 433.

We have, therefore, this curious result of the English decisions. If a creditor promises a debtor something in consideration of the debtor's payment of his debt, the promise is not enforceable, because the debtor's performance of his legal duty is no consideration, not being a legal detriment. If, however, a third person promises the debtor something in consideration of the debtor's payment of his debt, the promise is valid, because the debtor's performance of his legal duty is a consideration, although not a legal detriment. It is a satisfaction to know that Lord Coke is in no way responsible for this antinomy. But it is unfortunate that Bagge v. Slade was not called to the attention of the house of lords in the case of Foakes v. Beer; for in view of the declared reluctance of all the judges in that case to pronounce the creditor's promise invalid, it is possible, if not probable, that a knowledge of Lord Coke's real opinion might have led them to an opposite conclusion.—*James Barr Ames in Harvard Law Review.*

THE DANGER OF PRECEDENTS.

Conflicts between precedent and principle severely test a judge. It is not a light thing to overrule or disapprove a precedent, yet it is sometimes necessary to do this in order to prevent a mistaken decision from becoming a cancerous growth in the body of justice. The righteousness of our jurisprudence is due in no small degree to the courage and greatness of the judges who have been frank to see and own mistakes and bold to correct them. The sanest and wisest men do not break from or despise the past. They recognize and build upon such enduring foundations as have been already laid, but clear away the rubbish of outgrown errors. Judges and philosophers alike build upon the past, but they avoid and correct its mistakes.

The maxim *stare decisis* has enabled our noble body of law to "broaden slowly down from precedent." Without that maxim, or the principle it expresses, our magnificently reasoned jurisprudence would have been impossible. But it has not been slavishly followed. If it had been, our law would now have entrenched within it many an iniquitous rule that has been long ago repudiated. The danger of precedent is little when judges are great. But if a judge is small, the danger may be great, especially when the precedent was made by himself. But the chief source of the danger is in misapplying a precedent by failing to distinguish a difference in principles when circumstances are similar. To this are due some plainly erroneous and obviously unjust decisions. Where apparently slight, but really vital, distinctions between cases are unperceived a series of precedents may begin with a just decision and end with one that is rankly unjust. When to follow a precedent will lead to an injustice, a study of the underlying principles is imperative. This may reveal a fundamental distinction that has been overlooked. If it doesn't, the rule of the former decision demands thorough reconsideration, and if wrong, an unequivocal rejection. Among the judges of the past whose fame is high and secure are to be found only those who dared to dig down to sound principle even if a bad precedent had to be set aside in so doing.—*Case and Comment.*

CORRESPONDENCE.

DISTRIBUTION OF FUND REALIZED ON FORECLOSURE SALE.

To the Editor of the Central Law Journal:

At sales under creditor's bills committees of the creditors often purchase for the benefit of certain associated creditors, while at foreclosure sales of railroads and other large corporate properties, reorganization committees are, as a rule, the only bidders. This being the case the "upset" price is often fixed at a figure, quite disproportionate to the real value of the property, and the sale seldom realizes an advance over this figure. It is therefore a matter of much interest as to how this fund, derived from the sale, shall be distributed. The great trust companies, trustees in the usual railroad mortgages, derive a large portion of their income from the fees allowed them and their counsel in foreclosure cases, and are on the alert to have the priority of their fees established by the decree of foreclosure and thus finally determined, rather than await the coming in of the report of sale. So long as the fund is ample to pay costs, taxes, and fees, all goes well, but when the upset price or the price actually realized at the sale is small and the expenses are heavy, it then becomes a very material question as to who shall be first paid.

Taxes.—Taxes are, as a rule, a first lien upon real estate and override all other liens; and while the appointment of a receiver does not exempt the property from the imposition of taxes by the government, within whose jurisdiction the property is situated (*In re* Tyler, 149 U. S. 182), yet the practical effect is to suspend all statutory remedies for the collection of debts against received estates, except in so far as the court may allow. Central Trust Co. of N. Y. v. N. Y., etc. Ry., 110 N. Y. 252. The taxes should be paid out of the fund, even the taxes on personal property, seeing that the collector has been prevented from

making a levy (George v. St. Louis Cable Ry., 44 Fed. Rep. 119), and in New York it has been held that a franchise tax should be first paid by the receiver out of the fund. 110 N. Y. 252, *supra*. The statutory lien as to taxes is, as a rule, superior to all liens whatsoever, except judicial costs (*In re* Tyler, 149 U. S. 182), but it is the usual rule that the costs of the cause are to be first paid. St. Paul Title Insurance Co. v. Diagonal Coal Co. (Iowa), 64 N. W. Rep. 606. In some States, however, noticeably in Tennessee, the usual statutory tax lien is supplemented by a statute (Acts of Tenn. 1871, ch. 68), providing that where real estate is sold under a decree of any court in the State, the judge shall order a reference as to taxes, and if it is found that there are any taxes unpaid, they shall be paid out of the first money collected from the sale of said real estate, and the Supreme Court of Tennessee has recently held that under this statute, the taxes must be paid before the costs. Dunn v. Dunn, 42 S. W. Rep. 263.

Taxable Costs.—What are the taxable costs which should be paid before taxes or other statutory liens, made prior to mortgages? They are such costs as are taxable "as between party and party," *e. g.*, clerks' and officers' fees, witness fees, fees of special commissioners and masters, compensation of the receiver and his counsel; the compensation of the receiver's counsel being to the receiver as a part of his expenses and not directly to his counsel. Petersburg Trust Co. v. Dellatorre, 70 Fed. Rep. 645-6; Stuart v. Boulware, 133 U. S. 78; St. Paul Title Insurance Co. v. Diagonal Coal Co., 64 N. W. Rep. 606. The fees of the counsel for complainants are not a part of the taxable costs "as between party and party," but as between solicitor and client. Whitsett v. City Building Association, 3 Tenn. Ch. 526; Keith v. Fitzhugh, 15 Lea (Tenn.), 50; 2 Beach's Modern Equity Practice, sec. 1915.

Compensation and Counsel Fees of Receiver.—The compensation of the receiver and his counsel fees, being a part of the taxable costs, are therefore prior to the receiver's certificates, the fees of the trustee and its solicitors. Petersburg, etc. Co. v. Dellatorre, 70 Fed. Rep. 645; St. Paul Title Ins. Co. v. Diagonal Coal Co., 64 N. W. Rep. 606.

Receiver's Certificates. — These evidences of indebtedness, while not a part of the taxable costs, are issued in almost every case where large corporate estates are wound up by the courts, and an erroneous impression has arisen among the laity that these certificates are "giltedged," because the court had entered an order "that they shall constitute a first lien and be paid out of the fund;" but when a receiver borrows money on orders made without prior notice to the parties interested, the lender takes the risk of the final action of the court. Union Trust Co. v. R. R., 117 U. S. 434. The court should be very cautious in ordering these certificates to be issued. Investment Co. v. Ohio & N. W. Ry., 36 Fed. Rep. 48, and the receiver must follow strictly the order and direction of the court. Smith on Receiverships, 626. If properly issued they should be paid before the fees of the trustee or its counsel or the fees of solicitors for complainants in creditors' bills (70 Fed. Rep. 645, *supra*), but subsequent to taxes, unless perchance the certificates were issued to pay taxes of former years, when equity would seem to require that they should be paid *pro rata* with the taxes. *In re* Tyler, *supra*.

Counsel and Trustee's Fees.—As above stated complainants' counsel fees are not a part of the taxable costs of the cause, but it is now a well settled rule of equity that where a party by his diligence protects an estate in which he has a common interest with others, or brings into court a trust fund for administration and distribution, he must be remunerated out of such estate or fund for his necessary expenses, including counsel fees, for his counsel not only represented his interests but incidentally represented all others having a comonm and like interest. Petersburg, etc. Co. v. Dellatorre, *supra*; Trustees v. Greenough, 105 U. S. 527; Meddaugh v. Wilson, 151 U. S. 345; R. R. v. Pettus, 113 U. S. 116; *Ex parte* Lehman, Durr & Co., 59 Ala. 631; Grant v. Lookout Mountain Co., 9 Pickle (Tenn.), 698; Strang v. Taylor, 2 South. Rep. 760; Bound v. S. C. R. R., 59 Fed. Rep. 510. To protect counsel they have a lien on the fund going to their clients. 70 Fed. Rep. 645. Laborers' liens, taxes and such other independent statutory liens are superior to the fees of the trustee and his solicitors in foreclosure suits. 64 N. W. Rep. 606 *supra*. Generally, therefore, the order of distribution in foreclosures of mortgages and in general creditors' bills should be as follows: (1) The taxable costs as between party and party, including compensation of receiver and his counsel. (2) Taxes; (3) receivers, certificates; (4) compensation of the trustee and his counsel and, in creditors' bills, fees of counsel for complainants; (5) creditors in the order of priority set out in the final decree.

LEWIS M. COLEMAN.

Chattanooga, Tenn.

BOOK REVIEWS.

KERR'S SUPPLEMENT TO WILTSIE ON MORTGAGE FORECLOSURE.

The treatise of which this is a supplement appeared in 1889. The necessity of bringing it down to date, in view of the great mass of decisions on the subject, each year is apparant. The original work of Mr. Wiltsie possessed decided merit and has doubtless been a valuable aid to practitioners in the solution of the many perplexing questions with which the subject of foreclosure abounds and which are constantly arising. The present volume is very much after the same plan and arrangement as the original one. In effect it is a companion volume to it, being labelled Vol. 2. Within its pages all the decisions rendered since the publication of the original edition are carefully gathered, analyzed and classified. In addition many new chapters are added. There is a complete table of cases and an admirable index. The book has over two thousand pages. Published by Williamson Law Book Co., Rochester, N. Y.

AMERICAN ELECTRICAL CASES, VOL. 6.

This, the latest volume of a series of reports, which modern scientific development has rendered necessary, contains a collection of all the important cases (excepting patent cases) decided in the State and federal courts of the United States from 1873 on subjects relating to the telegraph, the telephone, electric light and power, electric railway, and all other practical uses of electricity. To many of the cases are appended valuable notes by the editor, William W. Morrill, Esq. This volume embraces the cases decided in 1895 and 1896, and among them are many important cases. This series of reports is invaluable to those whose work and studies are within the scope of the subject. It is a volume of nine hundred pages, well printed, and handsomely bound. Publishe1 by Matthew Bender, Albany, New York.

STATE CONTROL OF TRADE AND COMMERCE.

The student of the law will find great interest and much food for thought in this volume of some two

hundred pages. It discusses live questions in a philosophical manner. The burning questions of the day, involving control by the States of private as well as of public employments, and the validity of contracts as to employment in apparent restraint of trade and commerce, are, at the present time, of political as well as legal interest, and find satisfactory treatment here. It is a book not alone of reference, but one which the thoughtful student will read with pleasure and profit. It is published by Baker, Voorhis & Co., New York.

SHIPMAN ON EQUITY PLEADING.

This is one of the Hornbook series, and prepared by the same gentleman who was the author of a satisfactory work on Common Law Pleading, one of the earlier treatises in the same series. The present volume treats of a subject which is of great importance, and one wherein practitioners, as a rule, are not thoroughly posted. The text is well prepared and the citation of authorities full and complete. It embraces the subjects of parties, proceedings in a equitable suit, bills in equity, the disclaimer, demurrer, the plea, the answer and the replication. Published by West Publishing Co., St. Paul.

BOOKS RECEIVED.

Abbreviations used in Law Books, Reprinted from the Lawyer's Reference Manual of Law Books and Citations. By Charles C. Soule (Edition of 1883), Boston. The Boston Book Co., 1897.

Engineering and Architectural Jurisprudence. A Presentation of the Law of Construction for Engineers, Architects, Contractors, Builders, Public Officers, and Attorneys at Law. By John Cassan Wait, M. C. E., LL. B., Attorney and Counselor at Law and Consulting Engineer; Member of the American Society of Civil Engineers; Sometime Assistant Professor of Engineering, Harvard University. First Edition. First Thousand. New York: John Wiley & Sons. London: Chapman & Hall, Limited, 1898.

Estee's Pleadings, Practice and Forms, Adapted to Actions and Special Proceedings, under Codes of Civil Procednre. By Morris M. Estee, Counselor at Law. Fourth Edition. Revised and Enlarged by Charles T. Boone, Counselor-at-Law. In Three Volumes. San Francisco: Bancroft-Whitney Co., Law Publishers and Booksellers, 1898.

Bouvier's Law Dictionary. By John Bouvier. A New Edition, thoroughly Revised and Brought up to Date, by Francis Rawle, of the Philadelphia Bar. Vol. 1, Boston. The Boston Book Company, 1897.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Disability.—After an injury, a barber went to his shop, and attempted to do some work, but he suffered such pain that he fainted away, and was sent home in a hack. During the week he was somewhat better, and visited his shop each day, suffering pain all the time, and occasionally working a little, but was unable to perform all of his duties because of pain, and after that he was compelled to remain in bed for some time; Held, he was totally disabled, within the meaning of an accident policy insuring against total disability only.—HOHN V. INTERSTATE CASUALTY CO. OF NEW YORK, Mich., 72 N. W. Rep. 1105.

2. ACCIDENT INSURANCE — Voluntary Exposure.—An insured does not voluntarily expose himself to unnecessary danger unless he acts with gross or wanton negligence.—JOHNSON V. LONDON GUARANTEE & ACCIDENT CO., Mich., 72 N. W. Rep. 1115.

3. ACTION — Abatement — Death of Party.—Where a case is commenced against the receivers of a railroad company, and afterwards the receivers die, and a receiver *de bonis non* is appointed as their successor, and no attempt is made to substitute or revive the action in the name of the receiver *de bonis non* for more than a year after his appointment, held, that a motion to abate the action for the reason that it has not been revived will be sustained.—HUTCHINGS V. EDDY, Kan., 50 Pac. Rep. 944.

4. ADJOINING LAND OWNERS—Lateral Support.—The lateral support to which land is entitled is that which it needs in its natural condition, and, if the superstructure causes it to fall, the adjoining owner is not liable.—HEMSWORTH V. CUSHING, Mich., 72 N. W. Rep. 1108.

5. ADVERSE POSSESSION—Color of Title.—Deed from defendant, the only heir of T, deceased, after rendition of judgment for plaintiffs in a suit to have it declared that a deed of the land to T from his father was on the parol trust that, after payment by T and his brothers and sisters of a debt of their father, the land should belong to them all, is color of title, seven years' adverse possession under which would give title.—TAYLOR V. SMITH, N. Car., 28 S. E. Rep. 295.

6. ADVERSE POSSESSION — Ejectment.—Ordinarily, one who has been in the actual, open, exclusive, and uninterrupted possession of real estate for 10 years thereby acquires absolute title to the same.—FINK V. DAWSON, Neb., 72 N. W. Rep. 1087.

7. ALTERATION OF INSTRUMENTS—Bills and Notes.—A change of the date of maturity of a note from December 1, 1892, to January 1, 1893, without the consent of the

maker, is such an alteration as releases him.—FIRST NAT. BANK OF FT. WORTH, TEX., v. PAYNE, Ky., 42 S. W. Rep. 738.

8. ANIMALS—Injuries — Evidence of Habits.—In support of a disputed allegation that a dog attacked a passing team on a particular occasion, it may be shown that the dog had a habit of attacking passing teams; the probability being that it acted as it was accustomed to act under like circumstances.—BRODERICK v. HIGGINSON, Mass., 48 N. E. Rep. 269.

9. APPEAL—Judgment — Setting Aside Nonsuit.—An appeal will not lie from an order setting aside a nonsuit, within Laws 1891, p. 70, allowing appeals from "any final judgment."—READY v. SMITH, Mo., 42 S. W. Rep. 727.

10. APPEAL — Jurisdictional Amount.—Where a number of separate property owners join in a suit to restrain the collection by a city of special taxes assessed upon their separate lots, and to recover back certain parts of the assessments already paid by them respectively, the jurisdictional amount, on an appeal to the supreme court, is to be determined, not by the aggregate of all the assessments, but by the amount assessed against the property of each individual owner; and, if some of such amounts are less than the jurisdictional sum, the appeal must be dismissed as to them.—OGDEN CITY v. ARMSTRONG, U. S. S. C., 18 S. C. Rep. 98.

11. APPEAL—Sureties.—The sureties upon an undertaking in appeal from a justice of the peace are liable for the whole amount of the debt, costs, and damages, provided the same does not exceed the sum nominated in said undertaking.—SHOCKMAN v. DAVIS, Kan., 50 Pac. Rep. 947.

12. ASSUMPSIT—Implied Contracts.—At the instance of defendant, plaintiff procured leases which were accepted by the former. Plaintiff, anticipating early payment of money due from defendant, and also that he would be given remunerative employment by defendant, did not intend to charge for his services, but there was no agreement that the service should be rendered free of charge: Held, that the plaintiff was entitled to recover the reasonable value of his services.—THOMAS v. THOMASVILLE SHOOTING CLUB, N. Car., 28 S. E. Rep. 293.

13. ATTACHMENT — Goods Fraudulently Conveyed.—Where a debtor disposes of his goods with intent to defraud his creditors, they may attach the goods in the hands of persons conspiring with him to conceal them.—HAMBURG v. PALETZ, Tenn., 42 S. W. Rep. 807.

14. AWARD — Uncertainty.—An award on a partnership accounting giving to one partner one-half of certain property, with the balance to the other, is final, though the actual manual distribution of such property is not provided for.—PARKER v. DORSEY, N. H., 38 Atl. Rep. 785.

15. BANKS AND BANKING—National Banks—Cashier—Authority.—The cashier of a national bank is presumed to have the same authority as cashiers of other banks of discount in respect to receiving evidences of debt for collection, since national banks, being authorized to carry on a banking business, have incidental authority to make collections for other persons.—HANSON v. HEARD, N. H., 38 Atl. Rep. 788.

16. BENEVOLENT SOCIETY—Mandamus.—In order that a *mandamus* issue, the right of the relator to have the thing required to be done must be clear, and it must be determined that no other adequate remedy exists.—STATE v. SMITH, N. J., 38 Atl. Rep. 811.

17. BILLS AND NOTES—Descriptio Personæ.—A note, with the words, in the body thereof, "We promise to pay," and signed, "P Co., by A, President," followed by the signatures, "T, R, and B, Directors," is *prima facie* a joint obligation of the P Co. and T, R, and B, individually, as the word "Directors" is merely *descriptio personæ*.—TAYLOR v. REGER, Ind., 48 N. E. Rep. 262.

18. BILLS AND NOTES—Consideration.—Defendant executed to plaintiff his notes, on plaintiff's agreeing to set out and care for, in the spring, certain trees, which defendant had purchased from him. This he failed to do, and the trees became worthless: Held, in an action on the notes, that there was a total failure of consideration, and plaintiff could not recover.—PERKINS v. BROWN, Mich., 72 N. W. Rep. 1095.

19. BILLS AND NOTES — Note Payable to Maker.—M made a note payable to his own order, indorsed it in blank, and delivered it to H. The note was paid in full by partial payments before H transferred it to B, who took it before maturity. There was no evidence that any one besides H held the note in the meantime: Held, that it must be presumed that H was the legal holder of the note when M made the payments.—BUEHLER v. MCCORMICK, Ill., 48 N. E. Rep. 287.

20. BILLS AND NOTES — Payment. — Where the payee of a note boarded with the maker, and both parties understood that the board was furnished and accepted in payment of the note, it constituted a payment, even as against a subsequent indorsee of the note after maturity. — WHITTAKER v. ORDWAY, N. H., 38 Atl. Rep. 789.

21. BOUNDARIES — Oral Agreement.—To give validity to an oral agreement fixing a dividing line between adjoining land of antagonistic claimants, it is sufficient that there be a disputed boundary; an actual interference of boundary lines as shown by title papers not being necessary.—GAYHEART v. CORNETT, Ky., 42 S. W. Rep. 780.

22. BUILDING ASSOCIATION—Mortgages—Husband and Wife. — A husband and wife mortgaged to a building association real estate owned by them as tenants by entireties. The husband was a member of the association, holding two shares of stock, and had received an advance of $1,000, the par value of the shares. The only promise to pay recited in the mortgage was that of the husband, and he only agreed to pay his weekly dues, interest, premium, fines, and assessments. The provision in regard to default in payment was that thereupon the dues, etc., provided for, should be considered as due, and the mortgage foreclosed. Held, that as the mortgage was given to secure the payment of dues and assessments, and not the repayment of money borrowed, it did not bind the wife as principal, though the money was used for the improvement of the real estate.—HARRISON BUILDING & DEPOSIT CO. v. LACKEY, Ind., 48 N. E. Rep. 254.

23. CARRIERS—Passenger — Freight Train.—One who takes passage on a freight train will be presumed to understand that different cars, couplings, and brakes are used, and that cars must be coupled and shifted in the course of yard work at the various stations; that jars and jolts are incident to the ordinary management, and necessarily affect the equilibrium of persons standing in the car.—MOORE v. SAGINAW, T. & H. R. CO., Mich., 72 N. W. Rep. 1112.

24. CARRIERS OF GOODS — Delivery — Negligence. — Where the carrier delivered goods to a person of the same name as the one to whom the goods were sent, because of such person's having, by false and fraudulent devices, impersonated the consignee, the carrier is not liable, unless he failed to act in good faith and with due diligence. — PACIFIC EXP. CO. v. HERTZBERG, Tex., 42 S. W. Rep. 795.

25. CARRIERS OF PASSENGERS—Negligence.—Where a passenger on an electric car was injured by the breaking of the trolley wire, which fell upon him while on the back platform of the car, if the accident was caused by a latent defect, which defendant could not discover by reasonable examination, and it employed suitable contractors to erect the wire, and proper material and a skillful method of construction, plaintiff could not recover. — BALTIMORE CITY PASS. RY. CO. v. NUGENT, Md., 38 Atl. Rep. 779.

26. CARRIERS OF PASSENGERS — Trespassers — Negligence. — Where one having a ticket entitling him to ride as a passenger on a train boarded said train at an unusual time and place, and while it was in motion, and on a portion thereof where passengers were not

ordinarily received, but with the intention of becoming a passenger, and, being ordered off by an employee of the railway company, jumped off the train while it was still in motion, and was thereby injured, it was for the jury to say whether he was a trespasser.—MARTIN V. SOUTHERN RY. CO., S. Car., 28 S. E. Rep. 803.

27. CHATTEL MORTGAGE—Foreclosure Sale—Waiver.—Section 6, ch. 12, Comp. St., prescribing the mode of conducting a chattel mortgage sale, was designed for the protection of the mortgagor, and he may waive his right thereunder to have the mortgaged property in view at the time of sale, if he chooses to do so. — LEXINGTON BANK V. WIRGES, Neb., 72 N. W. Rep. 1049.

28. CONFLICT OF LAWS — Contracts. — A contract of guaranty signed in Michigan, and mailed to the guarantee in Illinois, where it is dated, and where payments, if any, are to be made, is an Illinois contract.—JOHN A. TOLMAN CO. V. REED, Mich., 72 N. W. Rep. 1104.

29. CONTRACT. — Where it was charged that, if a contractor failed in the discharge of the duty under a building contract, the owner could rightfully discharge him, the court could refuse a request to charge that, if the contractor did not do his work under the contract in a workmanlike manner, the owner might terminate the contract, as the former includes the latter. — FEASTER V. RICHLAND COTTON MILLS, S. Car., 28 S. E. Rep. 801.

30. CONTRACT — Construction — Right of Action. — Where a written contract contains a stipulation that "all disputes or questions that may arise in regard to prices of stock shall be settled by a reliable and competent person agreed upon by the parties to this contract," held, that such a stipulation is not a condition precedent to the maintenance of a suit, and is a matter of defense. — MCGRATH V. CROUSE, Kan., 50 Pac. Rep. 969.

31. CONTRACT—Promise to Third Person. — An action may be maintained on a promise made by defendant to a third person for the benefit of the plaintiff; and the fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it is dependent on a contingency, will not deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it.—WHITEHEAD V. BURGESS, N. J., 38 Atl. Rep. 802.

32. CONTRACT—Special Damages. — In an action on a note, defendant alleged by way of counterclaim that plaintiff agreed to loan a further sum at a certain time, and that, by his failure to do so until some time later, defendant was prevented from consummating a contemplated purchase and sale of cattle, and thereby lost certain profits: Held, that it was necessary to allege that plaintiff had knowledge of such facts as would reasonably indicate that failure to comply with the agreement would cause such special damages.—STRAHORN-HUTTON-EVANS COMMISSION CO. V. LACKEY, Tex., 42 S. W. Rep. 783.

33. CONTRACT OF SALE — Completion.—A contract by which A agrees to sell certain packages of beer, etc., to B upon the terms and conditions therein stipulated, when ordered by B, is not a completed contract of sale until B accepts the offer by making an order. — JULIUS WINKELMEYER BREWING ASSN. V. NIPP, Kan., 50 Pac. Rep. 956.

34. CONVERSION BY SHERIFF. — To hold an officer liable to a landlord, under section 4, 2 Gen. St. p. 1915, for sale on the demised premises, or removal therefrom, of the tenant's chattels taken in execution, without paying rent then due, proof that he had notice that rent was due is necessary, but such notice need not be in writing.—STATE V. HOWELL, N. J., 38 Atl. Rep. 748.

35. COPYRIGHT — Trial. — The owner of a copyright may assign the exclusive right to sell the copyrighted work in specified territory. — DAVIS V. VORIES, Mo., 42 S. W. Rep. 707.

36. CORPORATIONS — Authority of Officer. — The fact that goods ordered in the name of a corporation by the secretary are directed to be shipped to a third person is sufficient to put the seller on inquiry as to the officer's authority. — STILWELL-BIERCE & SMITH-VAILE CO. V. NILES PAPER-MILL CO., Mich., 72 N. W. Rep. 1107.

37. CORPORATION—Stock—Situs.—Stock in a Michigan corporation is personal property, and its *situs* follows the domicile of the legal owner, except in those instances where for special purposes the legislature has localized it.—JELLENIK V. HURON COPPER MIN. CO., U. S. C. C., W. D. (Mich.), 82 Fed. Rep. 778.

38. COVENANTS — Action for Breach. — Where the grantee in a conveyance of lands and premises in fee simple, which contains a covenant against incumbrances, before he enters into negotiations for the purchase, and before the execution and delivery of the deed of conveyance, has actual knowledge of the existence of a lease of said lands made between the grantor in said conveyance and the tenant, in which the rent is reserved to the grantor and his assigns, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for the breach of such covenant.—DEMARS V. KOEHLER, N. J., 38 Atl. Rep. 808.

39. COVENANT — Paramount Title — Ouster. — A judgment of ouster, in an action to recover lands of which defendant was in possession under a warranty deed, is not admissible against the grantor to show paramount title in an action of covenant, where the complaint does not allege that the grantor was notified, and requested to defend the title in the former action. —CULLITY V. DORFFEL, Wash., 50 Pac. Rep. 982.

40. CONVERSION — What Constitutes. — To entitle a plaintiff to recover in an action for conversion, two facts are essential to be proved—First, property, general or special, in the plaintiff, and a right of possession at the time of the conversion; and, second, a conversion of the thing by the defendant to his own use.—HODGE V. EASTERN RY. CO. OF MINNESOTA, Minn., 72 N. W. Rep. 1074.

41. CREDITORS' BILL — Pleading. — A creditors' bill, which seeks to have real estate conveyed to a wife by a stranger subjected to a judgment against the husband, which does not allege that the debt of the husband existed at the date of such conveyance, nor that the husband caused the conveyance to be made to his wife in expectation of becoming indebted, does not state a cause of action.—LAVIGNE V. TOBIN, Neb., 72 N. W. Rep. 1040.

42. CREDITOR'S SUIT—Jurisdictional Requirements.—In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be—First, an acknowledged debt, or one established by a judgment rendered; and, secondly, an interest of the creditor in the property, or a lien thereon created by contract, or by some distinct legal proceeding, and giving a right to have it appropriated to pay the debt. —D. A. TOMPKINS CO. V. CATAWBA MILLS, U. S. C. C., D. (S. Car.), 82 Fed. Rep. 780.

43. CRIMINAL LAW — Continuance — New Trial.—Where a person, under indictment or information for an offense, and held to answer on bail, consents to a continuance, he is not entitled to be discharged, under paragraph 5289, Gen. St. 1889.—STATE V. O'CONNOR, Kan., 50 Pac. Rep. 949.

44. CRIMINAL LAW—Crime against Nature.—"The infamous crime against nature, either with man or beast," made punishable by Cr. Code, § 47, includes not only the offense of sodomy, but any other act of bestial and unnatural copulation.—HONSELMAN V. PEOPLE, Ill., 48 N. E. Rep. 804.

45. CRIMINAL LAW — Homicide — Instructions.—Instruction on murder in the second degree is not called for where defendant claims an *alibi*, and the evidence for the State is that he, without any provocation, struck and then shot deceased on hearing him shout for a political candidate.—STATE V. WILLIAMS, Mo., 42 S. W. Rep. 720.

46. CRIMINAL LAW—Homicide—Instructions—Weight of Evidence.—A charge that the fact that a human

body was buried beneath the body of a mule would justify a finding that a murder had been committed, and that those who undertook to conceal the body were criminally concerned with the murder, is erroneous, as charging upon the weight of evidence.—SUTHERLIN v. STATE, Ind., 48 N. E. Rep. 246.

47. CRIMINAL LAW — Inquisition of Lunacy after Verdict.—At common law a suggestion of insanity, made after verdict and sentence, did not give rise to an absolute right in the convict to have the issue tried before the court and a jury, but addressed itself to the judge's discretion. Hence the manner in which such issues shall be determined is purely a matter of legislative regulation; and a State statute providing that it shall be determined by a jury summoned by the sheriff, with the assistance and concurrence of the ordinary, and not in the presence of a court or judge, does not deny to the prisoner the due process of law which is secured by the fourteenth amendment to the federal constitution.—NOBLES v. STATE OF GEORGIA, U. S. S. C., 18 S. C. Rep. 87.

48. CRIMINAL LAW — Nolle Prosequi.—Where a criminal case, on motion of the prosecuting attorney, is stricken from the docket with leave to reinstate, in defendant's absence, there is, in effect, a dismissal or *nolle prosequi*, and it cannot be reinstated.—STATE v. DIX, Ind., 48 N. E. Rep. 261.

49. CRIMINAL PRACTICE—Assault with Intent to Kill—Indictment.—An indictment under Rev. St. 1889, § 3489, declaring guilty of a felony a person who shall "on purpose and of malice aforethought shoot at or stab another with a deadly weapon or by any other means or force likely to produce death with intent to kill," stating that defendant stabbed with a knife having a blade four inches long, is sufficient, without an allegation that the weapon was a deadly or dangerous one.—STATE v. LAYCOCK, Mo., 42 S. W. Rep. 723.

50. CRIMINAL PRACTICE — Burglary—Indictment.—An indictment charging burglary in "the granary, warehouse, and building" of W, "a building in which divers goods, merchandise, and valuable things were then and there kept for sale and deposited," charges the commission of the burglary in a "warehouse," within Rev. St. 1889, § 3526, the word "granary" being used as an adjective, or, if used as a noun, being then subject to rejection as surplusage.—STATE v. WATSON, Mo., 42 S. W. Rep. 726.

51. CRIMINAL PRACTICE—Burglary—Variance.—Where defendant was found guilty of burglary, a misdescription of the property which the indictment alleged defendant stole at the time of the burglary was immaterial.—STATE v. DALE, Mo., 42 S. W. Rep. 722.

52. CRIMINAL PRACTICE—Seduction—Indictment.—An indictment which states "that Charles O'Keefe, late of the county of Ralls, on the ——day of——, 1892, at the said county of Ralls, in the State of Missouri, did then and there, under and by promise of marriage made unlawfully and feloniously seduce and debauch her, being then and there an unmarried female, of good repute, and under eighteen years age," etc., is sufficient.—STATE v. O'KEEFE, Mo., 42 S. W. Rep. 725.

53. DEATH BY WRONGFUL ACT — Contributory Negligence.—In a suit to recover damages under the statute for death occasioned by the negligent act of another, the court divided equally upon the question whether contributory negligence on the part of the sole next of kin will defeat the action.—CONSOLIDATED TRACTION CO. v. HONE, N. J., 38 Atl. Rep. 759.

54. DEED — Acknowledgment—Presumption.—Where the law provided that the acknowledgment of an instrument for the purpose of being recorded shall be by the "person who executed the same appearing before some officer authorized to take such acknowledgment, and stating that he had executed the same for purposes therein stated, and the officer taking such acknowledgment shall make a certificate thereof, sign and seal the same," a certificate of acknowledgment that failed to show that the party acknowledged the deed is insufficient.—HEINTZ v. O'DONNELL, Tex., 42 S. W. Rep. 797.

55. DEED—Bona Fide Purchaser—Quitclaim Deed.—A purchaser of real estate, conveyed to him by quitclaim deed, is not a "purchaser in good faith," so that his title will be protected by the provisions of section 77 of the Code of Civil Procedure.—KELLY v. MCBLAINE, Kan., 50 Pac. Rep. 963.

56. EMINENT DOMAIN—View of Premises.—A jury may, in considering their verdict, take into consideration the view of the premises, when a view is permitted by the trial court, and the results of their observation, in connection with the evidence produced before them.—WELLINGTON WATERWORKS v. BROWN, Kan., 50 Pac. Rep. 966.

57. EJECTMENT—Town Sites—Deed of Streets.—In an action to recover real estate claimed by a city as a portion of a street, under a deed made by the probate judge under the town site act, conveying to the city the streets and alleys, according to a certain map referred to, in which such street was designated, plaintiff contended that such deed was unauthorized as to the land in dispute, as no street was laid out at the time such deed was executed. It appeared that, prior to the time such deed was made, plaintiff purchased from the occupants thereof land inclosed by a certain fence, which included the land in dispute, together with a certain lot designated on the map referred to, and received from them a deed which he supposed described the whole tract, but which conveyed only the lot as designated on such map: Held, that plaintiff was estopped from assailing the validity of defendant's deed on the ground alleged, as his act amounted to a recognition on his part of the existence of the street in question.—LAUGHLIN v. CITY OF DENVER, Colo., 50 Pac. Rep. 917.

58. EQUITABLE MORTGAGE.—A contract in writing to secure a debt which is duly specified therein, in which the parties expressly declare their intention to create a lien, by way of mortgage, upon certain real estate particularly mentioned and described in the writing, upon the failure of certain conditions fully set forth in the contract, is an equitable mortgage, and, upon nonpayment and breach of the conditions, may be foreclosed in the ordinary way in a court of equity, and the interest of the mortgagors in the lands so pledged sold to satisfy the debt.—CUMMINGS v. JACKSON, N. J., 38 Atl. Rep. 763.

59. EVIDENCE — Declarations of Vendor.—Declarations of a vendor, made after the sale, and without the presence or knowledge of the purchaser, cannot defeat the purchaser's title.—SMITH v. JAMES, Tex., 42 S. W. Rep. 792.

60. EVIDENCE — Note Given for Gambling Debt.—In an action on a note, where the defense was that it was given for a balance due on gambling transactions in grain, evidence showing a continuous chain of similar transactions between the same parties, before and after the giving of the note, was competent, the material question being one of intent.—GARDNER v. MEEKER, Ill., 48 N. E. Rep. 807.

61. EXECUTION — Return.—An execution issued by a county court or justice of the peace is returnable 30 days after its receipt by the officer to whom the writ is directed, and the statute is mandatory that the writ must be returned within that time by the officer, stating what he has done under it, whether the property levied upon has been sold or not. A sheriff or constable has no authority to act under such an execution after the return day thereof.—BUCKLEY v. MASON, Neb., 72 N. W. Rep. 1042.

62. FORCIBLE ENTRY AND DETAINER—Claim of Title.—One cannot enter, and forcibly take possession of land from another, even under a claim of title, without subjecting himself to an action of forcible entry and detainer.—MCRAE v. WHITE, Tex., 42 S. W. Rep. 793.

63. FRAUDULENT CONVEYANCES — Consideration.—A *bona fide* pre-existing debt is a valid consideration for

the absolute transfer of property.—BANK OF MADISONVILLE V. MCCOY, Tenn., 42 S. W. Rep. 814.

64. FRAUDULENT CONVEYANCE — Evidence.—Where a purchase of an entire stock of goods was made from a merchant at a fair price, and with no knowledge that such merchant was indebted to other parties than those whose debts were paid through such purchase, the transfer will not be declared void, though the purpose of the purchaser was in part to secure payment of a debt due himself, and another debt due a bank of which he was at the time the president and managing officer.—NATHAN V. SANDS, Neb., 72 N. W. Rep. 1030.

65. FRAUDULENT CONVEYANCE—Husband and Wife.—A voluntary conveyance of property by a husband to his wife is fraudulent, in law, and void, as against creditors of the husband whose claims arose while the title was in him.—KEADY V. WHITE, Ill., 48 N. E. Rep. 314.

66. GAMING—Action for Money Lost.—Rev. St. 1894, § 6678 (Rev. St. 1881, § 4953), authorizing recovery in the name of the State of money lost at gaming, is not inconsistent with Rev. St. 1894, §§ 251, 252 (Rev. St. 1881, §§ 251, 252), requiring every action to be prosecuted in the name of the real party in interest, except that a person expressly authorized by statute may sue without joining the person for whose benefit the action is prosecuted; the State being a person, under Rev. St. 1894, § 1309 (Rev. St. 1881, § 1285), declaring that "the word 'person' extends to bodies politic and corporate."—ERVIN V. STATE, Ind., 48 N. E. Rep. 249.

67. GARNISHMENT — Notice to Defendant.—Garnishment proceedings are but auxiliary to the principal suit, and a defendant who has appeared by attorney in the principal suit is not entitled to prior notice of the issuance of the writ under rule 35, which provides that "a defendant who has appeared by notice of retainer or appearance shall be entitled to notice in advance of all future proceedings in the cause, although he may not have followed his appearance by plea or demurrer."—KETCHAM V. GROVE, Mich., 72 N. W. Rep. 1110.

68. GUARANTY—Who may Maintain.—An assignment of a bond for the payment of money, not limited in its scope, carries with it, to the assignee, a guaranty of such payment, connected with the bond, and intended to secure it.—WOOLBY V. MOORE, N. J., 38 Atl. Rep. 758.

69. HOMESTEAD—Abandonment.—Where the owner of a farm has established her homestead thereon, she may leave the same for a temporary purpose, with the intention of returning; and if, during all the time of such absence, she retains that intention, and refrains from establishing a homestead elsewhere, she has not abandoned the farm as her homestead.—KANSAS & T. COAL CO. V. JUDD, Kan., 50 Pac. Rep. 943.

70. INJUNCTION—Restraining Execution.—Where, in a statutory proceeding to try rights of property, a claimant's bond is filed, the court has jurisdiction over the person of a surety on such bond; and, where a judgment is entered against him by stipulation between the principal parties, he cannot, by a separate suit, enjoin the enforcement of such judgment, but his remedy is by appeal.—JOHNSON V. BLUM, Tex., 42 S. W. Rep. 791.

71. INSURANCE—Factors.—A commission merchant took out floating policies of insurance on all goods held by him on commission. At that time he held the goods of several principals for whom he had agreed to insure, but at the time of loss he also held goods of other parties with whom he had made no such agreement. None of his principals knew of the insurance until after the loss, when they all ratified his acts, and proved up their loss: Held, that they should all share *pro rata* in the proceeds of the insurance.—FERGUSON V. PEKIN PLOW CO., Mo., 42 S. W. Rep. 711.

72. INSURANCE—Proofs of Loss.—An insurance company waived proofs of loss where its adjuster, after having a personal interview with insured, who answered questions respecting the origin of the fire, and gave a list and value of the property, refused to pay the insurance to the assignee of the policy, because the property was mortgaged.—WESTERN ASSUR. CO. V. MCCARTY, Ind., 48 N. E. Rep. 265.

73. INTOXICATING LIQUOR—Illegal Sale of Liquor.—An information for illegally selling liquor "at divers times" on a certain day, when aided by specifications as to whom the sales were made, is sufficient, as constituting due process of law, though it does not name the kind, quantity or price.—HODGSON V. STATE OF VERMONT, U. S. S. C., 18 S. C. Rep. 80.

74. JUDGMENT—Res Judicata.—Under 2 Hill's Code, § 109, which provides but one form of action for the enforcement or protection of private rights and the redress of private wrongs, known as a "civil action," a former judgment in a suit in equity bars the right to a recovery in a subsequent action at law between the same parties, where the identical subject-matter is involved.—BRUCE V. FOLEY, Wash., 50 Pac. Rep. 935.

75. JUDICIAL SALES—Notice of Decree.—Purchasers at judicial sales must take notice of the terms of the decree. Where that and an order of sale issued in pursuance thereof differ, the decree governs, and it will not be presumed that bidders were misled or prevented from bidding by the variance.—MCKINLEY LANNING LOAN & TRUST CO. V. HAMER, Neb., 72 N. W. Rep. 1042.

76. LANDLORD AND TENANT—Estoppel to Deny Title.—Where defendant rented a farm and implements of plaintiff, he was estopped to deny that plaintiff was entitled to the rents, although in fact the property belonged to the estate of plaintiff's deceased wife, and plaintiff was not the administrator thereof.—HAMER V. MCCALL, N. Car., 28 S. E. Rep. 297.

77. LANDLORD AND TENANT—Holding Over—Renewals.—A tenant, having given written notice to its landlord that it would not renew a lease, and to its subtenants to vacate the premises, does not, by holding over, exercise its option to renew for a term of years, but is only liable for a time equal to the term of the lease.—RACKE V. ANHEUSER-BUSCH BREWING ASSN., Tex., 42 S. W. Rep. 774.

78. LANDLORD AND TENANT—Negligence—Defective Premises.—Where a tenant sued her landlord for injuries resulting from defective steps, and a witness testified that the steps were defective prior to the accident, evidence that a like accident had happened to the witness was immaterial.—DEAN V. MURPHY, Mass., 48 N. E. Rep. 283.

79. LANDLORD AND TENANT—Tenant at Sufferance.—A tenant for a term certain, holding over after the expiration of his term without the assent of his landlord, becomes a tenant at sufferance.—STATE V. ENGELKE, N. J., 38 Atl. Rep. 823.

80. LIBEL AND SLANDER—Privileged Communications.—Where a statement is privileged, though it imputes to another a crime punishable by imprisonment, the presumption is that it was not malicious, and express malice must be proved.—MCDAVITT V. BOYER, Ill., 48 N. E. Rep. 317.

81. LIFE INSURANCE—Conditions—Waiver.—A foreign insurance company waived a condition of the policy that insured must reside within certain limits, where its agent authorized to receive premiums when due received premiums with knowledge that insured was living in forbidden territory, though such agent had no authority to waive such condition, as notice to the agent was notice to the insurer, especially where the policy provided that premiums paid before such breach should be insurer's property, and no premiums paid after such breach were returned.—GERMANIA LIFE INS. CO. V. KOEHLER, Ill., 48 N. E. Rep. 297.

82. LIFE INSURANCE—Policy—Breach of Conditions.—Though a policy of life insurance may stipulate that it is issued on condition that the statements made by the insured in his application for the same, and in the statement certified by him to the company's medical examiner, "be made a part of this contract," and though in the application the insured made certain representations as to his age, which the company, in

defense to an action upon the policy, pleaded were ud l) nt, it was not incumbent upon the plaintiff to prove affirmatively that these representations were true, but the burden of showing the contrary was on the defendant.—O'CONNELL v. SUPREME CONCLAVE KNIGHTS OF DAMON, Ga., 28 S. E. Rep. 282.

83. LIFE INSURANCE — Reinstatement.—A condition avoiding a policy if quarterly premiums were not paid at the end of four days of grace is not waived by the fact that insured had frequently been reinstated after default in making payments, where such reinstatement had always been made upon the production of a health warrant, and with the express agreement that the reinstatement should not waive forfeiture for future non-payment.—FRENCH v. HARTFORD LIFE & ANNUITY INS. CO., Mass., 48 N. E. Rep. 268.

84. LIMITATIONS.—Where a statute is enacted after a cause of action has accrued, limiting the time within which such action can be brought, a reasonable time must be allowed for the commencement of the action before such statute works a bar.—CULBRETH v. DOWNING, N. Car., 28 S. E. Rep. 294.

85. LIMITATIONS—Acknowledgment—New Promise.—Defendant, in a letter to plaintiff, stated that he had sold certain property belonging to the latter, and said, "I have two hundred dollars for you, and would like to know what you would like for me to do with it;" and, in another letter, "I sent you one hundred dollars; will send the other when it is due:" Held an admission of indebtedness of $100, and a promise to pay the same.—WHEATLEY v. NIPPER, Tex., 42 S. W. Rep. 777.

86. LIMITATIONS—Attorney's Fees.—Where a judgment was taken in the name of a bank, which agreed to pay its attorneys, as a fee, a percentage thereof, upon satisfying the judgment the bank is bound to notify the attorneys; and though no attempt be made to conceal the collection, and the officials of the bank are ignorant of the attorneys' claim, the statute of limitations will not run against such attorneys until they receive such notification.—COBB v. FIRST NAT. BANK OF DECATUR, Tex., 42 S. W. Rep. 770.

87. LIMITATIONS—Infants and Lunatics.—The statute of limitations does not begin to run against an infant or a lunatic until after the infant reaches the age of 21 years or the lunatic is restored to sound mind; and a person suffering under either of these disabilities may commence his action during the continuance thereof, or within 6 years after it ceases.—SMITH v. FELTER, N. J., 38 Atl. Rep. 745.

88. MALICIOUS PROSECUTION — Termination of Prosecution.—When a committing magistrate, upon examination, discharges from custody an accused person who has been brought before him by virtue of an arrest, upon a warrant issued upon a complaint of a breach of the criminal law, the prosecution commenced by such complaint is terminated, so that the accused may commence an action for malicious prosecution against the complainant.—RIDER v. KITE, N. J., 38 Atl. Rep. 754.

89. MASTER AND SERVANT—Dangerous Premises—Contributory Negligence.—A servant who was primarily employed as track layer in the entry of a mine, and who was not charged with the special duty of looking after the safety of the roof of the entry, had a right to presume that the master had inspected and knew that the roof from which coal had been recently removed was reasonably safe. — ASHLAND COAL, IRON & RAILWAY CO. v. WALLACE'S ADMR., Ky., 42 S. W. Rep. 744.

90. MASTER AND SERVANT — Injury — Duty of Watchfulness.—Where employees of a railroad company are moving loaded cars by hand, and others are engaged in switching trains from track to track, the duty to be observant of each other's actions and regardful of each other's safety rests upon both classes. — MONTAGUE v. CHICAGO, M. & ST. P. RY. CO., U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 785.

91. MINES AND MINERALS — Conflicting Claims.—Under Code, § 269, subd. 5, contemplating a division of mining premises in conflict between the adverse claimants, if warranted by the evidence, and Rev. St. U. S. § 2326, permitting such division in adverse proceedings, it was error to refuse an instruction authorizing the same, and to restrict the jury to a verdict for either plaintiffs or defendant for the whole of the area in conflict, or to a finding that neither party was entitled to any of it, where there was some evidence in support of a contention that the area in conflict should be so divided.—CURRENCY MIN. CO. v. BENTLEY, Colo., 50 Pac. Rep. 920.

92. MORTGAGES—Foreclosure — Pleading.—A petition for the foreclosure of a mortgage against the estate of a decedent, and for a deficiency judgment as against his administrator, is sufficient on demurrer where it alleges a presentation of the claim as required by Code Civ. Proc. 1895, §§ 2603, 2604, though it does not allege that it was supported by affidavit, as required by said section, or describe the vouchers produced.—JONES v. RICH, Mont., 50 Pac. Rep. 936.

93. MORTGAGE — Notice by Foreclosure. — The fact that a foreclosure of a deed absolute intended as a mortgage has been entered gives no constructive notice to a *bona fide* purchaser of the property from the mortgagee, where no *lis pendens* has been filed, in view of Code Civ. Proc. § 726, providing that in foreclosure cases the docketing of a deficiency judgment only creates a lien.—CARPENTER v. LEWIS, Cal., 50 Pac. Rep. 925.

94. MUNICIPAL CORPORATIONS — Defective Sidewalks —Constructive Notice.—Where the cover of a coal hole in the sidewalk becomes displaced, and a person stepping upon it falls into the opening, and is injured, the city is not liable, in the absence of actual notice of the defect, unless the cover was out of place sufficiently long for the authorities to have discovered its condition, and replaced it, or unless they had reasonable cause to apprehend that it would become displaced by ordinary use.—COOPER v. CITY OF MILWAUKEE, Wis., 72 N. W. Rep. 1130.

95. MUNICIPAL CORPORATION — Defective Sidewalk — Joint Liability.—Where the allegations of a complaint against a city and a contractor show that the contractor built and maintained a dangerous and defective sidewalk, under the direction and supervision of the city, it shows a joint concurrence in the construction of the walk and knowledge of its defective and dangerous character, and the liability of both defendants is primary.—KANE v. CITY OF INDIANAPOLIS, IND., U. S. C. C., D. (Ind.), 82 Fed. Rep. 770.

96. MUNICIPAL CORPORATION — Improvements—Jurisdiction.—In an action to foreclose a street-assessment lien it is not fatal that no resolution of necessity was passed by the city council, or notice thereof given, as required by Rev. St. 1894, § 4289, where proper notice and hearing were given to the property owner before the making of the final assessment. — HUGHES v. PARKER, Ind., 48 N. E. Rep. 243.

97. MUNICIPAL CORPORATIONS—Liability for Defective Way.—A way will not be deemed unsafe if it would be reasonably safe and convenient for travelers but for the presence of snow or ice, under St. 1896, ch. 540, providing that no city shall be liable for any injury to persons or property suffered in a highway by reason of snow or ice thereon, if the place at which the injury was received was at the time of the accident reasonably safe and convenient for travelers. — NEWTON v. CITY OF WORCESTER, Mass., 48 N. E. Rep. 274.

98. MUNICIPAL CORPORATIONS—Manner of Improving Streets. — A declaration by the owner of a lot fronting on a street, alleging that, in improving the street, the city wrongfully, unnecessarily, and through favoritism, placed the curb on the opposite side of the street so as to leave a space between the curb and sidewalk for trees and ornamentation, while on the side next to plaintiff's property only space for a sidewalk was left, of less width than provided by the ordinances, does not state facts showing an abuse of discretion on the

part of the city authorities, such as will give a right of action against the city for damages.—ENGLISH v. CITY OF DANVILLE, Ill., 48 N. E. Rep. 328.

99. MUNICIPAL CORPORATIONS — Power to Prohibit Liquor Traffic. — A statute investing the town council with full power to make all such rules, by-laws, and ordinances respecting the police of said town as shall seem to them necessary and requisite for the security, welfare, good government, and convenience of the same, and for preserving the health, peace, and good order thereof, empowers the council to pass an ordinance entirely forbidding the sale of intoxicating liquors. — BAILEY LIQUOR CO. v. AUSTIN, U. S. C. C., D. (S. Car.), 82 Fed. Rep. 785.

100. MUNICIPAL CORPORATIONS — Sewer Assessments. —Where a new sewer becomes necessary to furnish a proper outlet for an existing sewer, land assessed for the old sewer may be further assessed for the new one; and if, in levying such further assessment, the assessors regard both sewers is a unit, estimate the value of the benefit afforded by this unit, make due allowance for what had been charged for the old sewer in excess of the benefit derived from it, and levy only the residue, no injustice will be done.—MAYOR, ETC. OF CITY OF BAYONNE v. MORRIS, N. J., 38 Atl. Rep. 819.

101. MUNICIPAL CORPORATION—Street—Acceptance of Dedication.—Proof that a strip of land dedicated as a street has been long used by pedestrians, that one street commissioner filled up a hole in it, and that another had the street scraped, is sufficient, in an action against the city for failing to keep it in repair, to require the submission to the jury of the question of the acceptance of the street by the city.—BALDWIN v. CITY OF SPRINGFIELD, Mo., 42 S. W. Rep. 717.

102. MUNICIPAL CORPORATIONS — Telegraph Pole and Wire Taxes—Commerce.—The city of Philadelphia has no power to impose pole and wire taxes upon a telegraph company doing interstate business, in excess of the reasonable expense to the city of the inspection and regulation thereof, and an ordinance imposing charges several times larger than this amount is invalid.—CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO., U. S. C. C., E. D. (Penn.), 82 Fed. Rep. 797.

103. NATIONAL BANKS — Guaranty.—The act of congress authorizing the organization of national banks confers upon them no authority, either in express terms or by implication, to guaranty the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature, whether executed by the cashier or the board of directors, are necessarily *ultra vires*.—COMMERCIAL NAT. BANK v. PIRIE, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 799.

104. NEGLIGENCE — Intention.—Where defendant was so near plaintiff that he ought to have known that the act of pointing an airgun at him was dangerous, he is liable for shooting him, though he had no intention of doing injury.—CHADDOCK v. TABOR, Mich., 72 N. W. Rep. 1093.

105. NEW TRIAL — Surprise.—Where an action had been pending for nearly a year, a new trial will not be granted plaintiff when he waited until 10 minutes before certain record testimony was required, and then made a demand on the custodian of the records for such testimony, and, on failure to obtain it, went to trial without asking a nonsuit or a continuance.—PINCUS v. PUGET SOUND BREWING CO., Wash., 50 Pac. Rep. 930.

106. OFFICE AND OFFICERS—Quo Warranto.—A public office is one whose duties involve in their performance the exercise of some portion of the sovereign power, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or some duly established division of it.—ATTORNEY GENERAL v. DROHAN, Mass., 48 N. E. Rep. 279.

107. PRINCIPAL AND AGENT — Set Off.—In the absence of fraud on the part of a firm, one who dealt with an agent of the firm, supposing him to be a member thereof, cannot set off claims against such agent in an action brought by the firm.—GRIFFITH v. KROEGER, Tex., 42 S. W. Rep. 772.

108. PROCESS—Service — Corporations.—The service of a summons upon a corporation by delivering a copy thereof to the vice-president, at a time when the president is absent from the company, and could not be found by the sheriff, is sufficient.—POND v. NATIONAL MORTGAGE & DEBENTURE CO., Kan., 50 Pac. Rep. 973.

109. PUBLIC LANDS — Patent Boundaries.—It is competent to resort to aid in supplying omissions or correcting mistakes in patents.—HAGINS v. WHITAKER, Ky., 42 S. W. Rep. 175.

110. QUIETING TITLE—When Lies.—A bill to quiet title will lie where complainant is in possession, and defendant, though claiming title, has exerted no possessory acts upon the land, which would confer upon complainant the right to bring ejectment.—PENROSE v. STEELMAN, N. J., 38 Atl. Rep. 807.

111. QUO WARRANTO — Title to Office.—One who seeks by *quo warranto* to obtain possession of a public office must show a better title than the incumbent.—STATE v. MOORES, Neb., 72 N. W. Rep. 1056.

112. RAILROAD COMPANY—Fires.—To entitle one to recover damages for the destruction of property by fire, he must be the owner thereof. Mere possession, such as would support an action for trespass *de bonis asportatis*, will not suffice.—MATHEWS v. GREAT NORTHERN RY. CO., N. Dak., 72 N. W. Rep. 1085.

113. RAILROAD COMPANY — Parties Defendant — Receiver.—A railroad company is not a proper party defendant to an action for injuries caused by negligence of employees while the road is in the hands of a receiver.—GABLEMAN v. PEORIA, D. & E. RY. CO., U. S. C. C., D. (Ind.), 82 Fed. Rep. 790.

114. RAILROAD COMPANY—Receivers' Sales—Liabilities of Purchaser.—Where defendant purchased its road at a receiver's sale, wherein the decree of the court freed the road from all liens, and there was no evidence whether certain betterments made by the receiver were made before or after such sale, no lien exists on the road because of a judgment for personal injuries inflicted while the receiver alone was operating the same.—HOUSTON ELECTRIC ST. RY. CO. v. BELL, Tex., 42 S. W. Rep. 772.

115. RECEIVERS — Contract Creditors.—A court of equity will not appoint a receiver of a corporation, without consent of the corporation itself, upon the application of a mere contract creditor, who has not secured an adjudication of his claim, and a judgment for an ascertained sum.—LEARY v. COLUMBIA RIVER & P. S. NAV. CO., U. S. C. C., D. (Wash.), 82 Fed. Rep. 775.

116. SALE—Conditional Sale—Right of Possession.—Where property is sold, and possession delivered to the vendee, on condition that the title shall remain in the vendor until the purchase price is paid, a failure of the vendee to make payments of the purchase money according to the terms of the contract vests the vendor with the right of possession to the property conditionally sold.—RICHARDSON DRUG CO. v. TEASDALL, Neb., 72 N. W. Rep. 1028.

117. SALES—Warranty—Breach.—During the course of a sale of personal property the vendor made statements in letters relative to the qualities and conditions of the property, which were positive affirmations of facts, and not mere opinions, and which were accepted and relied upon by the vendee in making the contract of purchase of the property: Held to constitute a warranty.—BURR v. REDHEAD, NORTON, LATHROP CO., Neb., 72 N. W. Rep. 1058.

118. SCHOOL WARRANTS—Validity.—Where a school warrant is void on its face, the trustee issuing it is not personally liable to a purchaser of it, who buys on the representation of the trustee that it "is all right;" the trustee knowing that it is void.—FIRST NAT. BANK OF ELKHART v. OSBORNE, Ind., 48 N. E. Rep. 256.

119. TAXATION—Taxable Property.—Where the owner of a farm, who was a mortgagor, conveyed the same in

fee simple to the mortgagee, and the owner of the mortgage, as mortgagee, discharged the bond, and surrendered the mortgage for cancellation in good faith, as the consideration of the conveyance, and the mortgage was canceled and discharged of record, the mortgage is no longer a ratable of personal property for the purpose of taxation, and cannot be included by the assessor in the list of ratables of property belonging to the former owner thereof, although it be that at the time of the assessment he remains the owner of the farm covered by the mortgage.—STATE v. RAMSEY, N. J., 38 Atl. Rep. 812.

120. TOWNSHIP TRUSTEES—Action on Bond.—There can be no recovery against the bondsmen of a township trustee for money illegally borrowed by him for the erection of a school house, on the alleged ground that he had converted it to his own use, where he did not in fact convert such money to his own use, though it appeared that he had made some disposition of it other than in the building of a school house.—HELMS v. STATE, Ind., 48 N. E. Rep. 264.

121. TROVER—Attachment—Levy on Goods.—Where an officer levies writs of attachment on the goods of a stranger, the plaintiffs in the attachment cases will be liable in trover, jointly with the officer, not only when they directed the wrongful levy, but also when they subsequently adopted or ratified his acts.—COLE v. EDWARDS, Neb., 72 N. W. Rep. 1045.

122. TRUSTS—Construction—Beneficiaries.—A settlor of a trust expressed his purpose to make provision for the support of complainants, daughters of his sister; and he created a trust fund for their benefit, and provided that the trustee should pay the income, or so much thereof as he might deem necessary, at his discretion, to complainants, and, in case the whole of the income should not be needed or used for their support, then to apply the surplus, or a part thereof, to the use of any other child of said sister, or to invest or accumulate the same as part of the principal: Held, that there was no manifestation of a general intention in favor of complainants alone, beyond a right to such part of the income as they might need to maintain them in their position in life, which conferred on them a vested interest in all the income, subject only to divestiture by act of the trustee in applying it to the use of the other children of said sister, or investing it as part of the principal.—BLYTHE v. GREEN, N. J., 38 Atl. Rep. 743.

123. TRUSTS—Fraud and Undue Influence.—A son, who had just attained his majority, who had no knowledge of business, and was intemperate, and easily influenced, was induced by his father, a wealthy man, of large experience and force of character, to convey to him all his property, valued at $50,000, in trust for himself for life, remainder to his personal representatives. There was no actual consideration. The father subsequently reconveyed the property, and the son conveyed the property in controversy to *bona fide* purchasers, after which he died: Held, that his legal representatives had no title to the land that equity would enforce, the trust deed being so unconscionable, and so impressed with undue influence, that the deed of reconveyance was rightfully executed.—EWING v. BASS, Ind., 48 N. E. Rep. 241.

124. TRUSTS—Life Estate — Sale — Remainder-men.—Where a trust is raised, under which a life estate is created in favor of a named person, with remainder over to certain other persons, falling within, and designated only by reference to, a class, and upon the death of the life tenant her personal representative undertakes to convey the fee, himself becoming indirectly the purchaser, upon a bill filed by a person claiming in remainder, for the purpose of reforming the original trust deed to the extent of declaring who was entitled in remainder, only the person who, as the representative of the deceased life tenant, sold the property, and in his own right afterwards became the purchaser, was a necessary party defendant; and a decree in favor of a given person, claiming in remainder, was binding, not only upon the defendant, but upon all persons claiming through him; and especially is this true as to one who took with notice of the remainder estate.—SIMMS v. FREIHERR, Ga., 28 S. E. Rep. 288.

125. VENDOR AND PURCHASER—Assumption of Mortgage.—A purchaser of real estate who covenants to pay and satisfy a mortgage upon the property conveyed is personally liable to the mortgagee, in an action of foreclosure, for any deficiency remaining after the proceeds of the mortgaged property shall have been exhausted.—GIBSON v. HAMBLETON, Neb., 72 N. W. Rep. 1033.

126. VENDOR AND PURCHASER — Fraud.—Where a vendor makes a false representation to his vendee as to the amount of taxes due on the premises, he is liable, though the vendee could have ascertained its falsity by inquiry.—WRIGHT v. UNITED STATES MORTG. CO. OF SCOTLAND, Tex., 42 S. W. Rep. 789.

127. VENDOR AND VENDEE—Pleading.—A cross bill prayed for the specific execution of a contract to buy land, and the reply thereto asserted that the contract had been changed by decreasing the price, and offered to perform the contract as set out in the reply: Held, that the acceptance not being absolute and unequivocal, the pleadings did not constitute an agreed case or prevent the dismissal of the cross bill.—SCOTT v. DAVIS, Mo., 42 S. W. Rep. 714.

128. VENDOR'S LIEN — Subrogation. — G furnished money to L, his son-in-law, to pay off a note of L secured by a vendor's lien. L paid off the note, and sent it to G, who held it until his death. The lien of the vendor was never released, and L did not ask that it be released: Held, that G's estate is entitled to be subrogated to the vendor's lien, the facts authorizing the conclusion that there was an agreement between G and L to that effect.—GREISHABER'S EXRS. v. FARMER'S EXR., Ky., 42 S. W. Rep. 742.

129. WAR IN FOREIGN STATE—Injuries to United States Citizen.—Acts of legitimate warfare committed during a revolution in a foreign State cannot be made the basis of individual liability.—UNDERHILL v. HERNANDEZ, U. S. S. C., 18 S. C. Rep. 83.

130. WATER POWER—Conveyances.—The rule that the grant of a mill or of a privilege of a mill carries with it not only the land on which it stands, but the land and water actually and commonly used therewith and necessary to its enjoyment, does not apply to a conveyance of a specifically described lot, though on it is a mill.—FORREST MILLING CO. v. CEDAR FALLS MILL CO., Iowa, 72 N. W. Rep. 1076.

131. WILLS—Attestation of Witnesses.—Where a will on its face does not show that the testatrix subscribed it in the presence of one of the witnesses, or acknowledged to him that she signed it, or declared it to be her will, or that said witness signed it at her request, or in her presence, the law will not presume that all of such acts, being statutory requirements, have been done.—IN RE TYLER'S ESTATE, Cal., 50 Pac. Rep. 927.

132. WILL — Construction of Devise — Estate of Devisees.—By his will, a testator gave a residue of his estate, consisting in part of lands, to his wife, "to be sold, retained, and exchanged, used, and managed by her as she may think proper, during her life; and, in case anything may be left after her death, it is my desire that she shall make some arrangements to have it equally divided" between certain children named: Held, that the widow took only a life estate in the lands, with a vested remainder in the children named, subject to be defeated by the exercise of the power of alienation annexed to the life estate; and that, the widow having died without exercising such power, the lands were not subject to judgments against her.—SKINNER v. MCDOWELL, Ill., 48 N. E. Rep. 310.

133. WITNESS — Transactions with Persons Since Deceased. — The deposition of a party cannot be read in his behalf against an administrator, though it was taken during the lifetime of the intestate.—FERGUSON'S ADMR. v. STATON, Ky., 42 S. W. Rep. 732.